No. 06-694
Title: United States, Petitioner
v.
Michael Williams
Docketed: November 17, 2006
Lower Ct: United States Court of Appeals for the Eleventh Circuit
Case Nos.: (04-15128-JJ)
Decision Date: April 6, 2006
Rehearing Denied: July 17, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~
Oct 5 2006	Application (06A351) to extend the time to file a petition for a writ of certiorari from October 15, 2006 to November 14, 2006, submitted to Justice Thomas.
Oct 6 2006	Application (06A351) granted by Justice Thomas extending the time to file until November 14, 2006.
Nov 3 2006	Application (06A351) to extend further the time from November 14, 2006 to December 14, 2006, submitted to Justice Thomas.
Nov 6 2006	Application (06A351) granted by Justice Thomas extending the time to file until December 14, 2006.
Nov 17 2006	Petition for a writ of certiorari filed. (Response due December 18, 2006)
Dec 18 2006	Waiver of right of respondent Michael Williams to respond filed.
Dec 20 2006	DISTRIBUTED for Conference of January 5, 2007.
Dec 22 2006	Response Requested . (Due January 22, 2007)
Jan 22 2007	Order extending time to file response to petition to and including February 21, 2007.
Feb 21 2007	Brief of respondent Michael Williams in opposition filed.
Mar 6 2007	Reply of petitioner United States filed.
Mar 7 2007	DISTRIBUTED for Conference of March 23, 2007.
Mar 26 2007	Petition GRANTED.
May 2 2007	The time for filing the joint appendix and petitioner's brief on the merits is extended to and including June 11, 2007.
Jun 11 2007	Brief amici curiae of American Center for Law and Justice and Eighteen Members of Congress filed.
Jun 11 2007	Brief of petitioner United States filed.
Jun 11 2007	Brief amicus curiae of Rutherford Institute filed.
Jun 11 2007	Brief amici curiae of National Law Center for Children and Families, et al. filed.
Jun 11 2007	Brief amicus curiae of Morality in Media, Inc. filed.

Jun 11 2007	Brief amici curiae of Lighted Candle Society, et al. filed.
Jun 11 2007	Brief amici curiae of Alabama, et al. filed.
Jun 11 2007	Brief amicus curiae of National Legal Foundation filed.
Jun 11 2007	Joint appendix filed. Statement of costs filed
Jun 27 2007	The time within which to file respondent's brief on the merits is extended to and including August 15, 2007.
Aug 10 2007	The time to file respondent's brief on the merits is further extended to and including August 20, 2007.
Aug 13 2007	Brief amici curiae of Free Speech Coalition and First Amendment Lawyers Association filed.
Aug 14 2007	Brief amici curiae of American Booksellers, et al. filed.
Aug 15 2007	Brief amici curiae of National Coalition Against Censorship, and the First Amendment Project filed.
Aug 20 2007	Brief of respondent Michael Williams filed. (Distributed)
Aug 30 2007	SET FOR ARGUMENT Tuesday, October 30, 2007.
Sep 11 2007	Record received from U.S.C.A. for 11th Circuit. (1 envelope)
Sep 17 2007	CIRCULATED.
Sep 24 2007	Reply of petitioner United States filed. (Distributed)
Oct 26 2007	Record received from U.S.D.C. for the Southern District of Florida. (1 box) This record contains sealed documents.
Oct 30 2007	Argued. For petitioner: Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. For respondent: Richard J. Diaz, Coral Cables, Fla.

No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

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MICHAEL WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 444 F.3d 1286. The opinion and order of the district court (App., *infra*, 46a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (App., *infra*, 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including Novem-

ber 14, 2006, and on November 6, 2006, he further extended the time to and including December 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. Section 2252A of Title 18 of the United States Code provides in part:

(a) Any person who—

* * * * *

(3) knowingly—

* * * * *

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct; * * *

shall be punished [by fine and imprisonment].

18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004). The entirety of Section 2252A, as well as the congressional findings codified at Pub. L. No. 108-21, § 501, 117 Stat. 676, are set forth in an appendix to the petition. App., *infra*, 72a-83a.

STATEMENT

Following the entry of a guilty plea in the United States District Court for the Southern District of Florida, respondent was convicted of one count of knowingly advertising, promoting, and presenting material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography, in violation of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), and one count of possession of computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2004). He was sentenced to 60 months of imprisonment on each count, to run concurrently, and to two years of supervised release. The court of appeals reversed respondent's conviction on the Section 2252A(a)(3)(B) count, holding that the provision was overbroad and impermissibly vague, and therefore facially unconstitutional. App., *infra*, 1a-45a.

1. a. This case involves 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), a provision enacted in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). Section 2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography

(*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).

Congress passed Section 2252A(a)(3)(B) in the wake of *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court held unconstitutional two provisions that expanded the definition of illegal child pornography, both of which were enacted in the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 2009-26. One provision, 18 U.S.C. 2256(8)(B) (Supp. IV 2004), defined "child pornography" to include a visual depiction that "is, or appears to be," of a minor engaging in sexually explicit conduct. The second provision, 18 U.S.C. 2256(8)(D), defined "child pornography" to include a visual depiction "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The Court held that those provisions were substantially overbroad in violation of the First Amendment because they "proscribed a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973)] nor child pornography under [*New York* v. *Ferber*, 458 U.S. 747 (1982)]." *Free Speech Coalition*, 535 U.S. at 240; see *id.* at 256-258. The Court explained that non-obscene depictions of sexually explicit conduct could be banned consistent with the First Amendment only if they involved real children, because only the need to protect real children from sexual abuse could justify dispensing with the requirement that material be shown

to be obscene before it can be prohibited. 535 U.S. at 250, 256.

With respect to Section 2256(8)(D), the pandering provision, the Court noted that it "punishe[d] even those possessors who took no part in pandering." *Free Speech Coalition*, 535 U.S. at 242-243. Thus, "[m]aterial[] falling within the proscription [was] tainted and unlawful in the hands of all who receive[d] it, though they b[ore] no responsibility for how it was marketed, sold, or described." *Id.* at 258. See *ibid.* (provision not only prohibits pandering but also prohibits "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain").

In response to *Free Speech Coalition*, Congress passed the PROTECT Act, aimed at revising those portions of the CPPA that this Court found unconstitutional to comply with the requirements set forth in the opinion. As particularly relevant here, Congress repealed Section 2256(8)(D), which had defined child pornography to include a visual depiction that had been pandered as such. In its stead, Congress added a new section targeting the act of pandering and solicitation itself. As Congress explained, "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent." S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003). Congress further explicated:

> [F]or example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography.

H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003). Congress made clear that "no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent." *Ibid.* That is so because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." *Id.* at 62.

b. Congress made 15 legislative findings that explain the reasons for the provisions of Section 501 in the PROTECT Act. Pub. L. No. 108-21, 117 Stat. 676.[1] In those statutory findings, Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676.

Congress found that child pornography "results from the abuse of real children by sex offenders," and that "the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children." § 501(12), 117 Stat. 678. Congress further found "that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated." § 501(5), 117 Stat. 676. In addition, Congress found that there was "no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." § 501(7), 117

[1] The Congressional findings can be located at 18 U.S.C. 2251 (Supp. IV 2004) under the notes section, or in the appendix to the petition (App., *infra*, 72a-76a).

Stat. 677. Congress found, however, that, since this Court's decision in *Free Speech Coalition*, "defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real." § 501(10), 117 Stat. 677.

Congress outlined the difficulties of proof in this area, including that "[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker." § 501(8), 117 Stat. 677. Congress further found that the nature of this retransmission can "make it difficult for even an expert conclusively to opine that a particular image depicts a real child." *Ibid.* Congress found that "[t]he number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before." § 501(10), 117 Stat. 677. Congress noted that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that Congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678.

2. On April 26, 2004, a federal agent logged into an Internet chat room ("per-ten's actions uncensored:1") using a screen name. Based on the title of the chat room and the messages posted in it, the agent recognized it as one dedicated to child pornography. The agent saw a public message from someone with a sexually graphic screen name, which was later traced to respondent. Re-

spondent's public message stated: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." The agent engaged respondent in a private Internet chat, during which they swapped non-pornographic photographs. App., *infra*, 2a (brackets in original); Plea Colloquy Tr. 29-32.

Following the photograph exchange, respondent claimed that he had nude photographs of his four-year-old daughter, stating: "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you??" App., *infra*, 2a (brackets in original). When respondent asked the agent for additional pictures and none was forthcoming, respondent accused the agent of being a cop. The agent answered by accusing respondent of being a cop. After repeating these accusations in the public part of the chat room, respondent posted a message stating: "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." The message was immediately followed by a computer hyperlink, which the agent accessed, that contained, among other things, seven images of actual minors, approximately five to 15 years old. The children in the images were nude and were displaying their genitals, engaging in sexually explicit conduct, or both. *Id.* at 2a-3a.[2]

3. After reserving the right to challenge the constitutionality of Section 2252A(a)(3)(B), respondent pleaded guilty, *inter alia*, to violating that provision. App., *infra*, 47a. The district court subsequently denied respondent's motion to dismiss the Section

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[2] A subsequent search of respondent's home resulted in the seizure of two computer hard drives that held at least 22 images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children, as well as sado-masochistic conduct or other depictions of pain. App., *infra*, 3a.

2252A(a)(3)(B) count based on the claim that the provision was unconstitutionally overbroad and vague. *Id.* at 46a-69a. In rejecting respondent's overbreadth challenge, the district court concluded that the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Id.* at 65a. The court noted that the statute "does not criminalize mere possession," but rather prohibits "the pandering in material which is not protected by the First Amendment." *Ibid.* In rejecting respondent's "peripheral 'void for vagueness' challenge," the court concluded it was unnecessary to address the claim, "particularly, where the Court finds that the argument, even if made with more fervor, would not be successful." *Id.* at 48a.

4. The court of appeals reversed in relevant part. App., *infra*, 1a-45a.[3]

a. The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." App., *infra*, 19a. The court further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a (not-

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[3] The court affirmed respondent's concurrent 60-month sentence based on respondent's guilty plea to the other count in the indictment, which charged respondent with possessing computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (2000 & Supp. IV 2004). App., *infra*, 1a-2a.

ing that "the materials [respondent] possessed were unquestionably depictions of 'real' children"). And the court did not question the "extraordinary importance" of protecting "children against sexual abuse and predatory pedophiles" and the need for "strong federal laws" to address that governmental interest. *Id.* at 6a.

The court noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." App, *infra*, 16a. Congress accomplished this by moving the pandering provision "from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The court also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

Nevertheless, the court of appeals held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. App, *infra*, 37a, 42a, 45a.[4]

b. In addressing respondent's overbreadth challenge, the court noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not

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[4] The court of appeals also rejected the government's argument that because respondent's written plea agreement referred only to a right to challenge his conviction on overbreadth grounds, the agreement did not preserve a right to challenge the conviction on vagueness grounds. App., *infra*, 37a-38a. The government does not contest in this Court whether respondent preserved a vagueness challenge to Section 2252A(a)(3)(B).

commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." App., *infra*, 21a. This was so, the court concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Ibid.* Because in the court's view, however, Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the court went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a.

In so doing, the court reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. App., *infra*, 22a. First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the court was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, in the court's view, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the court found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 23a. As the court understood Section 2252A(a)(3)(B), the intent to traffic in illegal pornography "only applies to one portion of the provision—promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 36a.

Accordingly, the court concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. App., *infra*, 35a-36a.

c. With respect to respondent's vagueness argument, the court was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with proof of any communication deemed "reflective of perverse thought." App., *infra*, 40a. The court further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was even more complex. *Id.* at 39a. In the court's view, the provision would capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Id.* at 40a-41a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision holding Section 2252A(a)(3)(B) unconstitutional is incorrect. The court of appeals not only misconstrued the law's scope, but relied on attenuated hypotheticals to conclude that the statute violated the First Amendment and due process vagueness principles. Properly construed, the statute is neither overbroad nor vague and is totally consistent with the Constitution. Congress targeted a particular form of unprotected speech in Section 2252A(a)(3)(B): speech that proposes to distribute, or solicits the receipt

of, material that is illegal to make or possess. The statute contains both an objective test for identifying when the speech concerns such material and a subjective knowledge requirement on the part of the speaker. Those requirements protect against improper applications of the law and give it the requisite clarity. The court of appeals' misguided invalidation of the law undermines Congress's effort to protect children by eliminating the widespread market in child pornography. Review by this Court is warranted.

A. The Court Of Appeals' Invalidation of An Act of Congress Warrants This Court's Review

Review by this Court is warranted because the court of appeals has invalidated an Act of Congress on its face. App., *infra*, 1a (reversing respondent's conviction "on the grounds of facial unconstitutionality"). Section 2252A(a)(3)(B) reflects Congress's effort to comply with this Court's decision in *Free Speech Coalition* while furthering the government's compelling interest in combating the creation and distribution of child pornography, and in protecting children from sexual abuse. Pub. L. No. 108-21, § 501, 117 Stat. 676. A decision that finds such a prohibition beyond Congress's constitutional reach deserves this Court's attention—particularly because the court of appeals misunderstood the sweep of the law and misapplied this Court's precedents.

As the court of appeals recognized (App., *infra*, 16a-17a), Section 2252A(a)(3)(B) addresses a key concern of this Court with the "pandering" provision invalidated in *Free Speech Coalition*. While that provision defined certain materials as child pornography for all purposes based on the manner in which they were promoted, and then imposed liability on anyone who possessed those

materials even if they were not a party to the pandering, see *Free Speech Coalition*, 535 U.S. at 258, Section 2252A(a)(3)(B) addresses the acts of pandering themselves. As Congress explained, "[t]he crux of what this provision bans is the offer to transact" in clearly proscribable child pornography. S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003); see H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003). Congress should not be stripped of the power to interdict such offers, and this Court should examine the statute in light of its constitutional precedents before letting such a ruling stand.

B. The Court of Appeals Erred in Striking Down Section 2252A(a)(3)(B) As Unconstitutionally Overbroad and Impermissibly Vague

The court of appeals' decision is incorrect. The court misinterpreted the scope of Section 2252A(a)(3)(B) by reading it more broadly than its language warrants. The court's misapprehension about what the statute prohibits and what it leaves unrestricted infected both its overbreadth and its vagueness analysis. The court of appeals' overbreadth analysis was further undermined by the court's failure, contrary to this Court's decisions, to analyze the ratio between protected applications and unprotected applications, or even to quantify the supposed protected applications. And its vagueness analysis violated the court's duty to give a clarifying construction to an Act of Congress if fairly possible. Properly understood, Section 2252A(a)(3)(B) fits well within constitutional limits.

1. The Court of Appeals Misinterpreted the Scope of Section 2252A(a)(3)(B)

The court of appeals misconstrued the fundamental nature of the prohibition in Section 2252A(a)(3)(B). The

court failed to recognize that the statute reaches only direct efforts to provide or to receive what is, or purports to be, illegal contraband. Section 2252A(a)(3)(B)'s regulation is directly connected to illegal conduct: it proscribes only speech that knowingly "advertises, promotes, presents, distributes, or solicits" material that is (or purports to be) illegal contraband. As Congress explained, it "ban[ned] the offer to transact in unprotected material, coupled with proof of the offender's specific intent." H.R. Conf. Rep. No. 66, *supra*, at 61; S. Rep. No. 2, *supra*, at 12. The court of appeals' concern (App., *infra*, 23a-24a & n.58) that Section 2252A(a)(3)(B) sweeps in abstract advocacy of the type at issue in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), is therefore entirely misplaced.

The court of appeals also erred in interpreting the statute's intent requirement, which has both an objective and subjective component. See, *e.g.*, App., *infra*, 40a (concluding that the "'reflects the belief' portion of the statute has no intent requirement"). To violate the statute, a person must advertise, promote, present, distribute, or solicit material "in a manner" either "that reflects the belief" or "that is intended to cause another to believe" that the material contains illegal child pornography. 18 U.S.C. 2252A(a)(3)(B). The words "in a manner" thus modify both of the prepositional phrases that follow it and provide an objective benchmark: a reasonable person must conclude from the language and context of the communication (its "manner") that the speaker has the "belief" that illegal child pornography is available or desired, or that the communication is "intended to cause another to believe" that the advertised, promoted, or solicited material is illegal child pornography.

Furthermore, the statute has a subjective requirement. By requiring that the statements be made "knowingly," Congress intended the statute to cover only those with the "specific intent" to traffic (or purport to be trafficking) in child pornography. See H.R. Conf. Rep. No. 66, *supra*, at 61-62 ("[T]he government establishes a violation with proof of the communication and requisite specific intent."); S. Rep. No. 2, *supra*, at 12 (noting that the provision requires "proof of the offender's specific intent"). Thus, as the district court recognized (App., *infra*, 65a), to violate this provision, a speaker must have understood that a reasonable person would have interpreted his words, in context, as referring to real child pornography. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

2. Section 2252A(a)(3)(B) Is Not Overbroad

a. Properly construed, Section 2252A(a)(3)(B) proscribes only unprotected speech. As the court of appeals recognized, subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence." App., *infra*, 19a. The provision simply makes it unlawful to offer or to solicit material that is or purports to be such illegal contraband. Nothing in the First Amendment disables Congress from proscribing such speech. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973) ("We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes.").

b. Even if Section 2252A(a)(3)(B) reached some protected speech, the statute would not be constitutionally

overbroad. The challenger "bears the burden of demonstrating" a statute's unconstitutional overbreadth. *Virginia* v. *Hicks*, 539 U.S. 113, 122 (2003). To meet that burden, it is not enough to show some overbreadth. Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). This is so because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law." *Hicks*, 539 U.S. at 119. As this Court has explained, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Ibid.* This Court has thus required that "a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the law's plainly legitimate applications * * * before applying the 'strong medicine' of overbreadth invalidation." *Id.* at 120.

Respondent did not make the requisite showing "'from the text of [the law] and from actual fact,' that substantial overbreadth exists." See *Hicks*, 539 U.S. at 122 (brackets in original) (citing *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 14 (1988)). The court of appeals acknowledged (App., *infra*, 21a-22a) that Section 2252A(a)(3)(B) clearly covers unprotected speech, including all commercial offers or solicitations for illegal child pornography, regardless of whether the offerors actually have any illegal child pornography. The court of appeals identified three reasons that it deemed the statute "problematic" in non-commercial contexts. App., *infra*, 22a-27a. The court, however,

improperly limited the "commercial context" by excluding situations in which "child pornography is discussed or exchanged." *Id.* at 34a. The court erred in assuming that the purveying or seeking of child pornography for barter or to foster trading relationships is "non-commercial." And the court did not explain why barter should be treated differently for constitutional purposes from sale. The court also included hypotheticals—such as a grandparent forwarding pictures (App., *infra*, 40a-41a)—that are clearly not covered by the statute, properly construed. Even assuming that some non-commercial applications of the statute pose constitutional problems, the court of appeals did not attempt to quantify the extent to which these areas of concern might actually exist or, more importantly, how these areas of potential application of the statute compare with the statute's legitimate sweep.

The court's reliance on a few hypothetical scenarios does not substitute for a proper overbreadth analysis. See *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) ("[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge."). It is hard to fathom how the types of isolated scenarios given by the court—persons falsely or mistakenly claiming to possess child pornography, the possession of which is itself a crime—could ever be substantial in comparison with the application of Section 2252A(a)(3)(B) to the type of conduct it was intended to reach: action-oriented speech offering or soliciting fully-proscribable child pornography. Thus, unlike the statutory definitions of child pornography whose implications for mainstream literature and movies depicting teenage sexual activity concerned this Court in

Free Speech Coalition, 535 U.S. at 247-248, 257, Section 2252A(a)(3)(B) could not ensnare promotions of Romeo and Juliet or mainstream movies such as *Traffic* and *American Beauty*. Overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Taxpayers for Vincent*, 466 U.S. at 801. It does not hold the enforcement of a law that targets clearly unprotected speech hostage to a few hypothetical scenarios.[5] The court of appeals did not identify realistic threats here, let alone find them substantial compared to the statute's legitimate scope.

To the extent that Section 2252A(a)(3)(B) sweeps within its ambit protected speech, any such application can be avoided through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *New York* v. *Ferber*, 458 U.S. 747, 773-774 (1982). There is no need for the draconian remedy of declaring the statute facially invalid. See *Ayotte* v. *Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'") (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (brackets in original)).

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[5] See, *e.g.*, *Gibson* v. *Mayor & Council of City of Wilmington*, 355 F.3d 215, 227-228 (3d Cir. 2004) (finding the scenarios advanced by the challenger "more than slightly unrealistic" and holding that "the number and weight of permissible applications far outweigh the possible invalid applications, if not in number, then certainly in kind"); *J&B Entm't, Inc.* v. *City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998) (rejecting an overbreadth challenge where the court could "imagine" that the public-nudity ordinance would have banned a nude production of "Hair" or a nude reading by novelist John Grisham, but "these examples, in comparison to its legi[illegible]ate sweep, are not substantial").

3. Section 2252A(a)(3)(B) Is Not Impermissibly Vague

The court below also erred in concluding that Section 2252A(a)(3)(B) was impermissibly vague. App., *infra*, 37a-42a. To survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid.* Moreover, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks and citation omitted). Finally, in the context of a federal statute, federal courts have a duty, if it is fairly possible, to construe the statute to provide clarity and to avoid unconstitutional vagueness. See, *e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 69; *Dennis* v. *United States*, 341 U.S. 494, 501-502 (1951).

The court of appeals' vagueness concerns stemmed from its misunderstanding of the scope of the statute, particularly the statute's intent requirement. See pp. 14-16, *supra*. Properly construed, the statute is not impermissibly vague. Rather, as the district court concluded, Section 2252A(a)(3)(B) "prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment." App.,

infra, 65a. The statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Ibid.* In short, it is not a statute that "simply has *no* core," *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974), but is a statute with a readily understandable and constitutionally unproblematic heartland.

C. The Court Of Appeals' Decision Interferes With A Component Of Congress's Effort To Suppress The Market For Child Pornography

The PROTECT Act revised federal child pornography laws to assure their constitutionality while comprehensively addressing a major social evil. Although the government has used Section 2252A(a)(3)(B) only rarely to date, the provision encompasses culpable conduct that other provisions may not reach. In particular, Congress sought to provide the government with a means to prosecute those who make direct requests to receive, or offers to provide, what purports to be illegal material, regardless of whether the government can prove that such material is in fact real child pornography or that it even exists.

As both the court of appeals (App., *infra*, 17a) and the district court recognized (*id.* at 55a-56a, 67a-68a), in the PROTECT Act Congress made specific legislative findings that addressed concerns of this Court in *Free Speech Coalition*. In those statutory findings, Congress emphasized the harm to real children that flows from the proliferation of the market for child pornography and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market

for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676.; see pp. 6-7, *supra*. In addition, Congress found that, "[i]n the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse," as "the mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution." § 501(13), 117 Stat. 678.

Congress gave prosecutors a variety of tools to achieve its aim, making clear that efforts to stimulate, feed, or capitalize on a market for what purports to be child pornography deserve no sanctuary. While other provisions address aspects of the problem, see, *e.g.*, 18 U.S.C. 1466A (Supp. IV 2004), 2251(d)(1)(A) (Supp. IV 2004), this provision is applicable where the government cannot prove that the materials depict actual children—or cannot locate the materials at all. This Court should review the court of appeals' holding that the Constitution precludes Congress's method for achieving its goal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-15128

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL WILLIAMS, DEFENDANT-APPELLANT

Apr. 6, 2006

Before: BARKETT, WILSON and REAVLEY*, Circuit Judges.

REAVLEY, Circuit Judge:

Michael Williams appeals his conviction for promotion of child pornography under 18 U.S.C. § 2252A(a)(3)(B) on the grounds of facial unconstitutionality. For this reason, we reverse that conviction. Williams was also convicted of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), and he appeals his sentence for that offense on the grounds that the court unconstitutionally enhanced his sentence under a mandatory guidelines scheme in violation of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005). Because there was no

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* Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

reversible *Booker* error, we affirm Williams's sentence of 60-months' imprisonment.

I. The Charges

On April 26, 2004, as part of an undercover operation aimed at combating child exploitation on the Internet, United States Secret Service Special Agent (SA) Timothy Devine entered an Internet "chat" room using the screen name "Lisa n Miami" (LMN). SA Devine observed a public message posted by a user employing a sexually graphic screen name, which was later traced to the defendant Williams. Williams's public message stated that "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." SA Devine as LNM engaged Williams in a private Internet chat during which they swapped non-pornographic photographs. Williams provided a photograph of a two to three-year-old female lying on a couch in her bathing suit, and five photographs of a one to two-year-old female in various non-sexual poses, one of which depicted the child with her breast exposed and her pants down just below her waistline. LNM sent a non-sexual photo of a college-aged female digitally regressed to appear ten to twelve years old, who LNM claimed was her daughter.

After the initial photo exchange, Williams claimed that he had nude photographs of his four-year-old daughter, stating "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you? ?" Williams asked for additional pictures of LNM's daughter. When these pictures were not received, Williams accused LNM of being a cop. LNM responded by accusing Williams of being a cop. After repeating

these accusations in the public part of the chat room, Williams posted a message stating "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." The message was followed by a computer hyperlink, which SA Devine accessed. The computer hyperlink contained, among other things, seven images of actual minors engaging in sexually explicit conduct. The nude children in the photos were approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity.

Secret Service agents executed a search warrant of Williams's home. Two computer hard drives seized during the search held at least twenty-two images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children and also depicted sadomasochistic conduct or other depictions of pain.

Williams was charged with one count of promoting, or "pandering," material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography in violation of 18 U.S.C. § 2252A(a)(3)(B), which carries a sixty-month mandatory minimum sentence. Williams was also charged with one count of possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B).

Williams filed a motion to dismiss the pandering charge on the grounds that 18 U.S.C. § 2252A(a)(3)(B) is unconstitutionally overbroad and vague. While the motion was pending before the trial court, the parties reached a plea agreement by which Williams would plead guilty to both counts but reserve his right to challenge the constitutionality of the pandering provision on appeal. The court sentenced Williams to sixty-months'

imprisonment for the pandering charge and sixty months for the possession charge, to be served concurrently.

II. Williams's Facial Challenge to 18 U.S.C. § 2252A(a)(3)(B)

A. Standard of Review

We review a district court's conclusion as to the constitutionality of a challenged statute de novo.[1]

B. The Child Pornography Problem

In this case, we consider the constitutionality of a law aimed at curbing the promotion, or "pandering,"[2] of child pornography. Relevant to this case, there are two types of child pornography. Roughly speaking, "actual" or "real" child pornography depicts true minors engaged

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[1] *United States v. Panfil*, 338 F.3d 1299, 1300 (11th Cir. 2003).

[2] "Pandering" is defined as the catering to or exploitation of the weaknesses of others, especially "to provide gratification for others' desires." *See* MERRIAM WEBSTER ONLINE DICTIONARY, http://www.m-w.com (last visited March 23, 2006). As a legal concept, pandering is most commonly associated with prostitution. In that context, pandering provisions are statutes penalizing various acts by intermediaries who engage in the commercial exploitation of prostitution and are aimed at those who, as agents, promote prostitution rather than against the prostitutes themselves. The term pandering, in some instances, is applied by Congress and the courts to the promotion of obscenity. *See, e.g.*, 39 U.S.C. § 3008 (prohibiting pandering advertisements of sexually provocative materials by mail), *Ginzburg v. United States*, 383 U.S. 463, 86 S. Ct. 942, 16 L.Ed.2d 31 (1966) (considering obscene nature of erotically advertised publications). Congress has characterized both the child pornography regulation at issue in this case (18 U.S.C. 2252A(a)(3)(B)) and its unconstitutional predecessor (18 U.S.C. § 2256(8)(D) (1996)) as "pandering" provisions.

in sexual conduct. In contrast, "virtual" child pornography depicts what appear to be actual minors engaged in sexual conduct, but in reality consists of computer-generated or enhanced images. Child pornography images of both types are typically circulated through the Internet. While society has benefitted greatly from the technological advances of the last decade, an unfortunate byproduct of sophisticated imaging technology and the rise of the Internet has been the proliferation of pornography involving children.[3]

The anonymity and availability of the online world draws those who view children in sexually deviant ways to websites and chat rooms where they may communicate and exchange images with other like-minded individuals. The result has been the development of a dangerous cottage industry for the production of child pornography as well as the accretion of ever-widening child pornography distribution rings.[4] Our concern is

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[3] Total federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004. Statement of Laura H. Parsky, Deputy Asst. Attorney General, Criminal Division before the Comm. On Commerce, Science, and Transportation, United States Senate Concerning Protecting Children on the Internet. January 19, 2006.

[4] In 1998, police cracked the "Wonderland Club," an Internet child pornography ring that involved members across twelve countries, and whose "chairman" was an American, uncovering some 750,000 images of children. Membership rules required each member to possess at least 10,000 images of pre-teen children and to agree to exchange them with other members. Other rings promote the worst imaginable forms of child pornography, such as "custom" child pornography (images of child rape created to order for the consumer) and "real time" child pornography, where members may watch the online rape of children as it occurs. In early 2006, federal authorities shut down an Internet web site called "Kiddypics & Kiddyvids" that streamed video of live child molestations involving children as young as eighteen months.

not confined to the immediate abuse of the children depicted in these images, but is also to enlargement of the market and the universe of this deviant conduct that, in turn, results in more exploitation and abuse of children. Regulation is made difficult, not only by the vast and sheltering landscape of cyberspace, but also by the fact that mainstream and otherwise innocuous images of children are viewed and traded by pedophiles as sexually stimulating.

Over the years, Congress has, by large bipartisan majorities, enacted legislation designed to punish those who produce, peddle, or possess child pornography. Congress has struggled to draft legislation that captures the truly objectionable child-exploitative materials while staying within the boundaries of the Supreme Court's First Amendment jurisprudence. The protection of our children against sexual abuse and predatory pedophiles is of extraordinary importance. We do not question that strong federal laws are needed, but they must pass constitutional muster. In other words, Congress may not "burn the house to roast the pig."[5] Whether that difficult balance has been struck in the instant legislation is the issue before us.

C. The Law and Child Pornography

We begin with a brief overview of child pornography law, which as a distinct body, is of relatively recent vintage. The regulation of child pornography was initially rooted in the Supreme Court's obscenity doc-

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[5] *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957).

trine. In *Miller v. California*,[6] the Court set forth the three-prong social merit test for determining whether materials are obscene, and therefore proscribable as a category of unprotected speech. In *Stanley v. Georgia*,[7] the Court held that privacy interests protect the right to possess obscene materials in one's own home, but subsequently clarified that this sanction does not extend to the distribution or receipt of obscenity, which may be regulated on interstate commerce grounds even if the transportation is for the recipient's personal use.[8] Against this backdrop, Congress passed its first child pornography legislation, the Protection of Children against Sexual Exploitation Act, in 1977.[9] It was keyed to the Miller standard, outlawing the use of children in the production of obscene materials and criminalizing the knowing distribution of such materials for commercial purposes.

In 1982, the Supreme Court first dealt directly with the issue of child pornography. In *New York* v. *Ferber*,[10] a unanimous Court proclaimed that child pornography was a distinct new category of speech without First

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[6] 413 U.S. 15, 93 S. Ct. 2607, 37 L.Ed.2d 419 (1973). The *Miller* test defines obscenity as a work that (1) taken as a whole, appeals to the prurient interest under contemporary community standards, (2) depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24, 93 S. Ct. at 2615.

[7] 394 U.S. 557, 568, 89 S. Ct. 1243, 1259-50, 22 L.Ed.2d 542 (1969).

[8] *See United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed. 2d 513 (1973).

[9] Pub. L. No. 95-225, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2423, 2251-2253).

[10] 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

Amendment protection, holding that the government may constitutionally prohibit the creation or promotion of pornography featuring real children even though it does not meet the *Miller* standard. The primary rationale of *Ferber* was that child pornography must be prohibited because of the intrinsic harm done to children in its production.[11] The Court reasoned that child pornography not only documents an underlying act of abuse—the sexual use of a child—but the recording of the act and subsequent circulation of the images perpetuates the injury to the depicted child.[12]

In response to *Ferber*, Congress passed the Child Protection Act of 1984 (CPA),[13] which was modeled on the New York statute upheld in *Ferber*. The CPA expanded the definition of child pornography to include non-obscene but sexually suggestive pictures of children and eliminated the commercial purposes requirement of earlier proscriptions. Interstate commerce advertisements and solicitations for child pornography were banned by the Child Sexual Abuse and Pornography Act of 1986.[14]

Congress first addressed the connection between child pornography and emerging computer technology in the Child Protection and Obscenity Enforcement Act

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[11] *Id.* at 758, 102 S. Ct. at 3355.

[12] *Id.* at 759, 102 S.Ct. at 3355-56.

[13] Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-2254, 2256, 2516).

[14] Pub. L. No. 99-628, 100 Stat. 3510 (1986) (codified as amended in scattered sections of 18 U.S.C.).

of 1988,[15] which prohibited the use of computers to transport, distribute, or receive child pornography. Shortly thereafter, the Court held in *Osborne v. Ohio*[16] that the *Stanley* right to private possession does not extend to child pornography involving actual children because, unlike adult obscenity, it springs from a grievous harm to children.

In the wake of *Ferber* and subsequent legislation, much of the child pornography industry was driven underground. Then, during the 1990s, advances in photographic and computer-imaging technology made production of child pornography possible without directly employing children. Visual depictions of what appeared to be children engaging in sexually explicit conduct, and that were virtually indistinguishable from images of actual children engaging in such conduct, could be generated. Further, with the advent of the Internet, these "virtual" child pornography images, along with "real" child pornography images, could be readily distributed. However, because the *Ferber* standard only addressed "live performances," and the visual recordation of same, the existing law left loopholes for the computer-generated images.[17]

To keep pace with these technological developments, Congress passed the Child Pornography Prevention Act of 1996 (CPPA).[18] Congress reasoned that these images, while not involving the use of actual children in their

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[15] Pub. L. No. 100-690, 102 Stat. 4485 (1988) (codified as amended at 18 U.S.C. §§ 2251, 2252).

[16] 495 U.S. 103, 109-11, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990).

[17] *Ferber*, 458 U.S. at 764-65, 102 S. Ct. at 3358.

[18] Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251 et seq.)

production, would still cause sufficient harm to children to justify banning them in the same way as "real" child pornography. Under the CPPA, the definition of child pornography was extended to cover any visual image that "is, or appears to be, of a minor engaging in sexually explicit conduct"[19] or that has been promoted in a manner that "conveys the impression" that a minor engaging in sexually explicit conduct is depicted.[20] The latter prohibition was referred to as the CPPA's "pandering" provision. The circuit courts that considered challenges to the CPPA were split, with four circuits sustaining the Act as constitutional[21] while the Ninth Circuit struck it down as overbroad and vague.[22] The Supreme Court granted certiorari in the Ninth Circuit case to resolve the circuit split.

D. The Supreme Court's Decision in Free Speech Coalition

In *Ashcroft v. Free Speech Coalition*,[23] the Supreme Court struck down as unconstitutionally overbroad the two above-referenced subsections of the CPPA's definition of child pornography. The first defined child pornography as any visual depiction, including a computer-generated depiction that "is, or appears to be,

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[19] 18 U.S.C. § 2256(8)(B) (1996) (invalidated 2002, amended 2003).

[20] 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003).

[21] *United States v. Fox*, 248 F.3d 394 (5th Cir. 2001), *vacated by* 535 U.S. 1014, 122 S. Ct. 1602, 152 L. Ed.2d 617 (2002); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999).

[22] *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999).

[23] 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

of a minor engaging in sexually explicit conduct."[24] The second, CPPA's "pandering" provision, defined child pornography as a "visual depiction [that] is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct."[25] The Court held that these definitions reached more than what could constitutionally be banned as unprotected speech under current obscenity law.[26]

The first definition was deemed overbroad because it prohibited speech (virtual or computer depictions, artistic works, or cinematic depictions of youthful actors) that was not obscene under *Miller*, and which recorded no crime and created no victims through its production, as did the "real" child pornography in *Ferber*.[27] The second definition, the "pandering" provision, was deemed overbroad because it defined as child pornography materials that had been promoted "convey[ing] the impression" that sexually explicit depictions

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[24] 18 U.S.C. § 2256(8)(B) (1996) (invalidated 2002, amended 2003).

[25] 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003).

[26] *See Free Speech Coalition*, 535 U.S. at 240, 251, 122 S. Ct. at 1396, 1402 (citing *Miller*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973), and *Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)).

[27] The Court noted that, although they clearly could not be considered obscene under *Miller*, Renaissance paintings, productions of Shakespeare's "Romeo and Juliet," and noteworthy films such as "Traffic" and "American Beauty" could be swept within the ambit of the CPPA, since arguably they contain some graphic depictions that "appear to be" of minors engaging in sexual activity (even though such images neither involve nor harm children in the production process), and because the CPPA provided no pause for inquiry into the work's redeeming value considered in totality. 535 U.S. at 246-48, 122 S. Ct. at 1400.

involving minors would be found within the material, even when, in fact, there were no such scenes. This subsection thus criminalized downstream possession of material described, or pandered, as child pornography by someone earlier in the distribution chain even if no minors were actually involved in the production. Finding the government's evidence insufficient to show any harm in material merely pandered as containing child pornography, the Court criticized the provision because it criminalized speech based solely "on how the speech is presented" rather than on "what is depicted."[28]

Although the Court found the CPPA inconsistent with *Miller* and lacking support in *Ferber*, the government attempted to justify the definitions in other ways. The government argued that virtual child pornography can be used to seduce children into participating in sexual activity, and that such materi[illegible]l also "whets the appetites" of pedophiles, encouraging them to engage in illegal conduct.[29] The Court rejected these arguments, noting that other laws, such as those that prohibit unlawful solicitation of a minor, more closely regulate the unsavory use of virtual child pornography; and that the government may not prohibit speech on the grounds that it may merely encourage, and not incite, pedophiles to engage in illicit conduct.[30]

The government next argued that its objective of eliminating the market for "real" child pornography necessitates a prohibition on virtual images as well because, since they are often indistinguishable and

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[28] *Id.* at 257, 122 S. Ct. at 1405-06.

[29] *Id.* at 251-53, 122 S. Ct. at 1402-03.

[30] *Id.* at 251-54, 122 S. Ct. at 1402-04.

traded in the same market, the synthetic images promote the trafficking of works produced through the exploitation of real children.[31] The Court rejected this market deterrence theory, noting that, "[i]n the case of the material covered by *Ferber* [depictions of actual minors engaged in sexual acts], the creation of the speech is itself the crime of child abuse; the prohibition deters the crime by removing the profit motive."[32] In other words, because no crime underlies the production of virtual child pornography, the production-based rationale set forth in *Ferber* does not apply to synthetic images.

Finally, the Court rejected the government's argument that, since advanced technology makes it difficult to tell whether pictures were made with real children or computer imaging, thus thwarting prosecutorial efforts, both kinds of images must be banned. The Court stated that the argument, "that protected speech may be banned as a means to ban unprotected speech . . . . turns the First Amendment upside down."[33]

E. The PROTECT Act

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[31] *Id.* at 254, 122 S. Ct. at 1404.

[32] *Id.* (citing *Osborne v. Ohio*, 495 U.S. 103, 109-110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990)).

[33] *Id.* at 255, 122 S. Ct. at 1404. The Court also found that the CPPA's affirmative defense, which allowed offenders in some cases to avoid conviction for nonpossession offenses by showing that materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children, was insufficient to rescue the statute from overbreadth because it was incomplete and shifted the burden to the defendant to prove his speech was not unlawful. *Id.*

Almost immediately after the *Free Speech Coalition* decision was handed down, Congress began an effort to craft responsive legislation. Two pieces of proposed legislation aimed at revising the objectionable provisions of the CPPA were introduced in the Senate and the House.[34] There was significant debate about key provisions in the competing bills, including the proposed revisions to the pandering provision.[35] Despite ongoing disagreement, the houses compromised and passed the PROTECT Act, now codified in scattered sections of 18 U.S.C.

The revised pandering provision of the PROTECT Act at issue in this case, 18 U.S.C. § 2252A(a)(3)(B), provides that any person who knowingly—

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

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[34] The Senate introduced S. 151, the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), and the House introduced H.R. 1161, the Child Obscenity and Pornography Prevention Act of 2003 (COPPA).

[35] To illustrate, after the House reviewed the Senate's version, it offered an "amendment" to the Senate bill on March 27, 2003, which, in reality, was a recommendation that the Senate's language be replaced in its entirety with the House's version found in the COPPA. (Compare House Amendment to S. 151, Title §§ 501-512 (March 27, 2003) with H.R. 1161, 108th Cong. at §§ 1-4 (2003) (identical language)).

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

commits a criminal offense. For the purposes of this provision, a "minor" means "any person under the age of eighteen years"[36] and "sexually explicit conduct" is defined as "actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person."[37]

Any person who violates, or attempts or conspires to violate, the pandering prohibition is subject to a fine and imprisonment for a minimum of five years and up to twenty years.[38] It is an affirmative defense for certain reproducers, distributors, recipients, and possessors of child pornography charged under other subsections of § 2252A that the alleged child pornography depicts actual adults rather than minors or that no "actual" minors were involved in the production.[39] However, the

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[36] 18 U.S.C. § 2256(1).

[37] 18 U.S.C. § 2256(2).

[38] 18 U.S.C. § 2252A(b)(1).

[39] 18 U.S.C. § 2252A(c).

affirmative defense expressly does not apply to the pandering provision.[40]

F. What Congress Has Done Differently

At the outset of our discussion, we note that the new pandering provision allays certain concerns voiced by the Court in *Free Speech Coalition*. First, the Court's primary objection to the CPPA's pandering provision was that pandered materials were criminalized for all purposes in the hands of any possessor based on how they were originally pandered.[41] By moving the pandering provision from the definitions section to a stand-alone status, and using language that targets only the act of pandering, the new provision has shifted from regulation of the underlying material to regulation of the speech related to the material. This remedies the problem of penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography.

With respect to its legislative findings for the PROTECT Act, Congress largely abandons the secondary effects and market deterrence justifications found wanting by the Court in *Free Speech Coalition*, although it does reiterate the need to ensure that the result of *Ferber*—driving illegal child pornography from the bookshelves—is extended to extinguish the "open and notorious trafficking in such materials" on the In-

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[40] *Id.*

[41] 535 U.S. at 257-58, 122 S. Ct. at 1405-06 ("Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described.").

ternet.[42] Congress instead focuses primarily on beefing up its findings that technological advancements since *Free Speech Coalition* have increased the prosecutorial difficulties raised by the ready availability of technology able to disguise depictions of real children (proscribable under *Ferber*) to make them unidentifiable or to make them appear computer-generated (defensible under *Free Speech Coalition*).[43]

Finally, the PROTECT Act provides a new definition for child pornography, which in addition to "real" child images includes (1) any digital or computer-generated image that is "indistinguishable" from that of a minor engaging in sexually explicit conduct,[44] and (2) a visual depiction that has been created or modified to appear as an identifiable minor engaging in sexually explicit conduct.[45] The PROTECT Act also amended the general obscenity statute to define a new category of unprotected synthetic child pornography that incorporates, in part, the *Miller* definition. That law now prohibits the production, distribution, receipt or possession, in an

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[42] Congressional Findings, § 501 at (15).

[43] *Id.* at (4)-(13).

[44] The definition of sexually explicit conduct for "indistinguishable" images is slightly narrower than the one attached to the pandering provision as set out above, requiring that depictions of sexual intercourse or lascivious exhibitions of the genital or pubic area also be "graphic" (18 U.S.C. § 2256(2)(B)), meaning "that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted . . ." 18 U.S.C. § 2256(10).

[45] 18 U.S.C. § 2256(8). As discussed above, the affirmative defense that no real child was involved in the production of child pornography, which the Court found incomplete under the CPPA, has been extended to most possessors and distributors of these defined materials.

interstate commerce setting, of (1) obscene visual depictions of any kind that depict a minor engaging in sexually explicit conduct, and (2) any visual depiction that is, or appears to be, of a minor engaging in certain enumerated "hard core" acts and lacks serious literary, artistic, political, or scientific value.[46] Thus a virtual depiction of a minor involved in any of the expressly listed acts is outlawed even where only one of the three *Miller* prongs is explicitly satisfied.[47] Because the materials Williams possessed were unquestionably depictions of "real" children, these new virtual child pornography definitions are not directly at issue in this case, but the limitations of their reach have implications regarding Congress's purpose for enacting the pandering provision, as we discuss below. For example, the definitions do not capture innocent pictures of children that pedophiles view, collect, and trade as "dirty" pictures. And it remains to be seen whether the Supreme Court will find acceptable the PROTECT Act's truncation of the *Miller* obscenity standard with respect to child pornography.

G. Williams's Overbreadth Challenge

Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face.[48] Williams asserts

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[46] 18 U.S.C. § 1466A(a)-(d). The enumerated acts are "graphic bestiality, sadistic or masochistic abuse or sexual intercourse, including genital-genital, oral genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex . . ." *Id.* at § 1466A(a)(2)(A).

[47] The general obscenity statute provides no affirmative defense that no real child was involved in the production of the image.

[48] *Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. at 1404 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d

that the PROTECT Act prohibition of speech that "reflects the belief, or that is intended to cause another to believe" that materials contain illegal child pornography is no different than the CPPA's prohibition of images that "appear to be" or "convey the impression" of minors engaged in sexually explicit conduct that was struck down as overbroad in *Free Speech Coalition*.

We begin our analysis with the recognition that subsections (i) and (ii) of the PROTECT Act pandering provision capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same. As reviewed above, the government may constitutionally regulate, on interstate commerce grounds, the transportation and distribution of obscene material, even if it is legal to hold privately (i.e. non-real child pornography),[49] and may outlaw "real" child pornography for all purposes, including private possession.[50] However, the PROTECT Act pandering provision criminalizes not the speech expressed in the underlying materials described in (i) and (ii), but the speech promoting and soliciting such materials. The question before us is whether the restriction on that speech is too broad.

1. *The Government may wholly prohibit commercial speech that is false or proposes an illegal transaction.*

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830 (1973)).

[49] *Orito*, 413 U.S. at 141, 93 S. Ct. at 2676.

[50] *Osborne*, 495 U.S. at 110, 110 S. Ct. at 1696; *Ferber*, 458 U.S. at 760, 102 S. Ct. at 3359.

We recognize that, if we consider the pandering provision as purely a restriction of commercial speech, we do not apply strict overbreadth analysis.[51] Instead, we determine whether the government has narrowly tailored any content-based regulation on protected speech, that is neither misleading nor related to unlawful activities, to achieve its desired legitimate objectives.[52] Under this analysis, the government may prohibit completely the advertisement or solicitation of an illegal product or activity as well as false or misleading advertisement because neither is protected speech.[53] If a person possessing or seeking either obscene synthetic child pornography or "real" child pornography, offers to sell or buy it, this is unlawful commercial activity that the government may constitutionally proscribe. If a person does not have obscene or "real" child pornography but offers such things for sale, then the offeror is engaged in false or misleading advertising, which the government may likewise punish.

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[51] *See Bd. of Tr. of the State Univ. of New York v. Fox*, 492 U.S. 469, 477-81, 109 S. Ct. 3028, 3033-35, 106 L. Ed. 2d 388 (1989) (holding that the "least restrictive means" test does not apply to commercial speech cases); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 n. 20, 98 S. Ct. 1912, 1922, 56 L. Ed. 2d 444 (1978) (observing that "the justification for applying overbreadth analysis applies weakly, if at all, in the ordinary commercial context" because "[c]ommercial speech is not as likely to be deterred as noncommercial speech" and therefore does not require the added protection afforded by the overbreadth doctrine to third parties not before the bar).

[52] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (setting out the constitutional test for restrictions on commercial speech).

[53] *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S. Ct. 1817, 1829-30, 48 L. Ed. 2d 346 (1976).

If all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were, the Government need not show that it has narrowly tailored its restriction because neither of these scenarios involve protected speech. We observe, however, that false or misleading commercial advertising is already addressed under other state and federal laws, which are aimed at protecting consumers from fraud. Here, under legislation aimed at protecting children, the only person who is harmed by misleading speech, even if it preys on the basest of motives, is the would-be buyer of illegal child pornography, and that individual is scarcely in a position to complain. Also, although the penalties for false commercial advertising are not specifically raised here,[54] we note that a mere false commercial advertiser is punished on par with an actual child pornographer, without regard to the actual content or even existence of underlying material. Thus, a person offering for sale a copy of Disney's Snow White on false claims that it contains depictions of minors engaged in sexually explicit conduct has committed a crime punishable by a fine and at least five- and up to twenty-years' imprisonment,[55] a decidedly disproportionate and draconian penalty.

Because the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product and because, in the commercial context, we have before us no

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[54] The materials touted by Williams in this case were clearly illegal child pornography and we do not, in the commercial context, consider the overbreadth chilling effect on third parties not before the court.

[55] 18 U.S.C. § 2252A(b)(1).

challenge to the severity of punishment meted out for such behavior, the pandering provision would likely pass our muster as a prohibition of unprotected forms of commercial speech, if that were all it proscribed. However, the law is not limited to commercial exploitation and continues to sweep in non-commercial speech. Accordingly, we must move to the question of whether the restriction on such non-commercial speech is constitutionally overbroad.

2. The PROTECT Act pandering provision continues to sweep in protected non-commercial speech.

Because it is not limited to commercial speech but extends also to non-commercial promotion, presentation, distribution, and solicitation, we must subject the content-based restriction of the PROTECT Act pandering provision to strict scrutiny, determining whether it represents the least restrictive means to advance the government's compelling interest or instead sweeps in a substantial amount of protected speech.[56] Under this analysis, we find the language of the provision problematic for three reasons.

First, that pandered child pornography need only be "purported" to fall under the prohibition of § 2252A(a)(3)(B) means that promotional or [*sic*] speech is criminalized even when the touted materials are clean or non-existent. We echo Senator Leahy's concern that the provision thus "federally criminalize[s] talking dirty over the Internet or the telephone when the person

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[56] *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 120 S. Ct. 1878, 146 L.Ed.2d 865 (2000).

never possesses any material at all."[57] In a non-commercial context, any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of "Our Gang," a dirty handkerchief, or an empty pocket.

Further, while the commercial advertisement of an unlawful product or service is not constitutionally protected, this feature of the Supreme Court's commercial speech doctrine does not apply to non-commercial speech, where the description or advocacy of illegal acts is fully protected unless under the narrow circumstances, not applicable here, of immediate incitement. The First Amendment plainly protects speech advocating or encouraging or approving of otherwise illegal activity, so long as it does not rise to "fighting word" status.[58] Thus, the non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment.

Finally, we find particularly objectionable the criminalization of speech that "reflects the belief" that materials constitute obscene synthetic or "real" child pornography. Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional

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[57] S. Rep. No. 108-2, title VIII, at 23 (2003).

[58] *See Free Speech Coalition*, 535 U.S. at 253, 122 S. Ct. at 1403 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (holding advocacy of racist violence protected speech)). *See also Kingsley Int'l Pictures Corp. v. Regents of the Univ. of State of N.Y.*, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959) (holding advocacy of immoral activities was protected speech).

speech reflecting the deluded belief that real children are depicted in legal child erotica, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.[59]

Because lascivious is not defined under the PROTECT Act, we apply its ordinary meaning of "exciting sexual desires; salacious."[60] What exactly constitutes a forbidden "lascivious exhibition of the genitals or pubic area"[61] and how that differs from an innocuous photograph of a naked child (e.g. a family photograph of a child taking a bath, or an artistic masterpiece portraying a naked child model) is not concrete. Generally, courts must determine this with respect to the actual depictions themselves.[62] While the pictures needn't always be "dirty" or even nude depictions to qualify, screening materials through the eyes of a neutral factfinder limits the potential universe of objectionable images.[63]

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[59] 18 U.S.C. §§ 2252A(a)(3)(B)(ii), 2256(2)(A)(v).

[60] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 4th Ed. (2000)[.]

[61] 18 U.S.C. § 2256(2)(A)(v).

[62] Virtually all lower courts that have addressed the meaning of "lascivious exhibition" have embraced the widely followed "Dost" test, originally developed by a California district court and affirmed in an opinion by the Ninth Circuit. *United States v. Dost*, 636 F. Supp. 828, 832 (S.D. Cal. 1986) *judgm't aff'd, United States v. Wiegand*, 812 F.2d 1239 (9th Cir. 1987). The test identifies six factors that are relevant to the determination of whether a picture constitutes a "lascivious exhibition of the genitals or pubic area" under child pornography law.

[63] The Third Circuit has held that a depiction can constitute "lascivious exhibition of the genitals" even if a child is wearing clothes. *United States v. Knox*, 32 F.3d 733, 746 (3d Cir. 1994) (discussing the discernability of young girls' genitals through "thin but opaque clothing").

In this case, however, the law does not seek to attach liability to the materials, but to the ideas and images communicated to the viewer by those materials. This shifts the focus from a community standard to the perverted but privately held belief that materials are lascivious. Through this lens, virtually all depictions of children, whom to pedophiles are highly eroticized sexual objects, are likely to draw a deviant response. Many pedophiles collect and are sexually stimulated by nonpornographic depictions of children such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines —otherwise innocent pictures that are not traditionally seen as child pornography and which non-pedophiles consider innocuous.[64] As illustrated in this case, relatively innocent candid snapshots of children, such as those initially exchanged by the defendant Williams and the undercover agent, are also collected and used as a

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Although the material was purchased by Knox for sexual stimulation, the videotapes seized from him did not portray explicit sexual acts nor even depict nudity; rather, they contained "vignettes of teenage and preteen females" engaged in baton twirling and gymnastics routines and sometimes "striking provocative poses for the camera." *Id.* We note that the requirement that lascivious exhibitions be "graphic" under the PROTECT Act's amended obscenity definition likely eliminates a *Knox* result under the obscenity statute. *See* n.46, *supra*. However, that narrower definition does not apply to the pandering provision.

[64] Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L.REV. 209, 259-260 (2001). The highly eroticized use of children in fashion, television, and advertising is now the "soft porn" of child pornography. *Id.* Members of the North American Man Boy Love Association (NAMBLA—an organization for pedophiles, many of whom are in prison) reportedly find erotic stimulation by watching children on network television, the Disney channel, and mainstream films. *Id.* at 260. As one investigator put it: "I had found NMBLA's 'porn' and it was Hollywood." *Id.* (citation omitted)

medium of exchange. We cannot, however, outlaw those legal and mainstream materials and we may not outlaw the thoughts conjured up by those legal materials.

Freedom of the mind occupies a highly-protected position in our constitutional heritage. Even when an individual's ideas concern immoral thoughts about images of children, the Supreme Court has steadfastly maintained the right to think freely. As the Court stated in *Free Speech Coalition*, "First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[65] The Court reiterated that the concern with child pornography is "physiological, emotional, and mental health" of children, and thus regulation is permissible only when targeted at the evils of the production process itself, and not the effect of the material on its eventual viewers.[66] The PROTECT Act pandering provision misses that target and, instead, wrongly punishes individuals for the non-inciteful expression of their thoughts and beliefs.[67] However repugnant we may find them, we may not constitutionally suppress a defendant's beliefs that simulated depictions of children

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[65] 535 U.S. at 253, 122 S. Ct. at 1403 (finding that the fact that possession of non-obscene virtual child pornography may cause sexually immoral thoughts about children was not enough to justify banning it).

[66] *Id.*

[67] *Stanley*, 394 U.S. at 566, 89 S. Ct. at 1249 (stating that legislators "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts").

are real or that innocent depictions of children are salacious.

3. The Supreme Court's decision in Ginzburg *does not support pandering as an independent offense*

The Government's central justification for the pandering provision, found convincing by the district court, relies on the Supreme Court's decision in *Ginzburg v. United States*,[68] for the proposition that an individual may be found criminally liable for promoting material as appealing to prurient interests even though the material actually being promoted might not fall outside the First Amendment's protection. We believe that reliance is ill-grounded.

In *Ginzburg*, erotic publications that were not "hard core" pornography, and may not have been obscene per se, became the subjects of conviction because their prurient qualities were exploited, or pandered, by the defendant for commercially sexual purposes. The Court found that evidence of the manner in which the publications were advertised and mailed "was relevant in determining the ultimate question of obscenity," and that evidence of such pandering on the basis of salacious appeal "may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."[69] In *Free Speech Coalition*, the Court recognized the limited scope of the pandering rationale expressed in *Ginzburg*: that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and

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[68] 383 U.S. 463, 86 S. Ct. 942, 16 L. Ed. 2d 31 (1966).

[69] *Id.* at 470, 476, 86 S. Ct. at 947, 950.

thus satisfy the [obscenity] test."[70] The Court also suggested that *Ginzburg* has no application where, as in the case of the CPPA, "[t]he statute does not require that the context be part of an effort at commercial exploitation."[71]

We disagree with the district court that *Ginzburg* supports a prohibition of pandering as a stand-alone crime without regard to the legality, or even to the existence, of the pandered material. First, we note that, notwithstanding its brief mention by the Court in *Free Speech Coalition*, there is some question as to the continued vitality of the *Ginzburg* pandering rationale. Shortly after *Ginzburg* was decided, the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[72] that truthful, non-misleading commercial speech is protected by the First Amendment, although to a lesser degree than protected non-commercial speech. The sort of pandering that caused the publications in *Ginzburg* to be found obscene, in other words, has since gained some First Amendment protection. In one of two post-*Ginzburg* cases in the 1970s, a dissent joined by four justices states that "*Ginzburg* cannot survive *Virginia Pharmacy*."[73] While the Supreme Court has not sub-

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[70] 535 U.S. at 258, 122 S. Ct. at 1406 (quoting *Ginzburg*, 383 U.S. at 474, 86 S. Ct. at 942). The Court in *Ginzburg* applied the test for obscenity set out in *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), which preceded the current *Miller* test, but the differences between the tests are immaterial for the purposes of our analysis.

[71] *Id.* (internal quotation marks and citation omitted).

[72] 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976)[.]

[73] *Splawn v. California*, 431 U.S. 595, 603 n. 2, 97 S. Ct. 1987, 52 L. Ed. 2d 606 (1977) (Stevens, J., dissenting).

stantially addressed the *Ginzburg* pandering rationale since the 1970s, Justice Stevens more recently reiterated that, since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is "anachronistic."[74] Consequently, although *Ginzburg* has not been overturned, its precedential value is questionable.

Even if the *Ginzburg* pandering rationale remains viable, the PROTECT Act pandering provision, as discussed above, is not limited to the commercial context. In considering the CPPA pandering provision at issue in *Free Speech Coalition*, the Court clearly suggested that, even if the *Ginzburg* pandering rationale remains viable, it would only apply in a the commercial context.[75] The PROTECT Act pandering provision, like the CPPA pandering provision found unconstitutional in *Free Speech Coalition*, does "not require that the context be part of an effort at 'commercial exploitation.'"[76]

Finally, to the extent that the *Ginzburg* pandering rationale remains valid, it lends little constitutional support to the pandering provision at issue here. With respect to the "obscene" virtual or simulated material described under subsection (i), if the pandering rationale remains valid, then it might be the basis for a court to uphold a conviction under the PROTECT Act for distributing material of questionable social value that

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[74] *Playboy Entm't Group, Inc.*, 529 U.S. at 829, 120 S. Ct. 1878 (Stevens, J., concurring).

[75] 535 U.S. at 258, 122 S. Ct. at 1406 (2002).

[76] *Id.* (citation and internal quotation marks omitted).

would not be deemed obscene but for the defendant's promotion of it suggesting that it was. But if the rationale holds, then this would be the case under existing obscenity law and the pandering provision adds nothing in that respect. The rationale does not justify a prosecution under the PROTECT Act that goes farther than existing obscenity law by attempting to convict a defendant for distributing material that is *clearly* not obscene, merely because the defendant pandered it as obscenity.[77]

With respect to "real" child pornography as described under subsection (ii), the *Ginzburg* pandering rationale is of no relevance. If the pandering rationale remains relevant to determinations of obscenity, it does so because such determinations are made by a subjective test that weighs a publication's degree of social value under the *Miller* test. *Ginzburg* held only that pandering may be probative of those factors. Determinations of "real" child pornography as described in subsection (ii), on the other hand, are made by a purely

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[77] A congressional report offers the example of the movie "Carnal Knowledge," which the Supreme Court found not to be obscene because it was not patently offensive. *See* H. Cohen, CRS Report for Congress: Child Pornography: Constitutional Principles and Federal Statutes Produced Without an Actual Child: Constitutionality of 108th Congress Legislation (2003) (citing *Jenkins v. Georgia*, 418 U.S. 153, 94 S. Ct. 2750, 41 L. Ed. 2d 642 (1974)). Under the PROTECT Act, if a defendant distributed "Carnal Knowledge" "in a manner that 'reflects the belief, or that is intended to cause another to believe' that it contained an obscene visual depiction of a child, then the defendant would be guilty of a crime." *Id.* But the pandering rationale of *Ginzburg* allows merely "that in close cases evidence of pandering may be probative" of obscenity. *Id.* "Carnal Knowledge," because of the Supreme Court decision, is not a close case; therefore, to distribute it in a pandering manner would not make it obscene. *Id.*

objective test: whether or not the material visually depicts an actual minor engaged in sexually explicit conduct. The manner in which the material is promoted has no bearing on the answer to this question. As one commentator observed, "[n]o amount of pandering, even misleading pander, can convert a virtual child into a real child."[78]

In sum, the Government urges us to read the PROTECT Act as writing the *Ginzburg* pandering rationale into the law. We note that at least one state law concerning obscene visual depictions of children has succinctly done just that.[79] But the Government asks us to stretch that rationale much farther, to support pandering as an independent crime rather than only as evidence of the crime of obscenity or child pornography. We believe such an interpretation of *Ginzburg* butts directly against the holding of *Free Speech Coalition* and, accordingly, find that *Ginzburg* does not rescue the PROTECT Act pandering provision from substantial overbreadth.[80]

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[78] *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S. 2520 Before the Senate Comm. On the Judiciary*, 107th Cong. (2002) (testimony of Harvard School of Law Professor Frederick Schauer).

[79] *See, e.g.*, Ala.Code § 13A-12-195 (2005), providing that "[w]here the circumstances of the dissemination or public display of matter indicates that it is being commercially exploited by the defendant for its prurient appeal, such evidence may be considered in determining whether the matter appeals to the prurient interest, is patently offensive, or lacks serious literary, artistic, political or scientific value."

[80] Because it was an issue much debated by Congress and commentators in the wake of *Free Speech Coalition*, we do not ignore the "Romeo and Juliet" problem discussed at length in that case. *See* n.27, *supra*. The Court's concern with outlawing material either containing a depiction that "appear[ed] to be" a minor engaging in sexually explicit

4. The PROTECT Act pandering provision is not justified by legislative findings.

The pandering provision of the PROTECT Act, for reasons we have discussed, is inconsistent with *Miller* and *Ferber*, as reaffirmed in *Free Speech Coalition*, and is not sustainable under *Ginzburg*. The Government, however, seeks to justify its prohibitions in other ways.

First, noting the state's compelling interest in protecting children from those who sexually exploit them, Congress relies on *Ferber* and *Osborne* for the proposition that this interest extends to stamping out the

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conduct or that was presented or promoted "in a manner that convey[ed] the impression" that it contained such depictions, was that the whole aim of dramatic presentation is to make fictional happenings "appear" to be real. Under the overbroad definition of the CPPA, non-obscene movies employing youthful actors to simulate minors engaged in apparent sexually explicit conduct could be ensnared, even though no child was involved in the production[.]

Here, Williams urges that the PROTECT Act's "intended to cause another to believe" language is no different than the "appears to be" and "conveys the impression that" language found overbroad by the Court. While the Government argues it is a cure, we do not, for reasons discussed in this section, find the insertion of the word "obscene" into the material description particularly meaningful in avoidance of sweeping in meritorious works where the statute is punishing activity that is unrelated to the actual contents of the material. And if there is otherwise a constitutionally relevant distinction between the sweep of PROTECT and CPPA in this regard, it is a fine one. Whether, in an industry that functions on the suspension of disbelief, legitimate presenters and promoters of artistically meritorious films intend that viewers truly "believe" real minors are involved in such productions or, rather, simply invite the viewer to imagine, is debatable. Because we find the Act infirm on a number of other fronts, we need not split this hair.

market for child pornography.[81] However, Congress has not adequately explained why the mere pandering of otherwise legal material should be prohibited in the pursuit of this interest.

In the PROTECT Act's Conference Report, Congress mentions that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."[82] This appears to be a resurrection of the market-deterrence theory advanced by the Government, and rejected by the Court, in *Free Speech Coalition*. As the Court recognized, the prohibitions of "real" child pornography in *Ferber* and *Osborne* were upheld on a production-based rationale. The Court in *Ferber* allowed market deterrence restrictions because they destroyed the profit motive to exploit real children. Congress has again failed to articulate specifically how the pandering and solicitation of legal images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct.

Next, the Government points to the legislative findings of the PROTECT Act that articulate the difficulties in successful prosecution of child pornography possession cases where advancements in computer technology allow images to be so altered as to cast rea-

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[81] Congressional Findings (501) at (2)-(3) (citing *Osborne v. Ohio*, 495 U.S. 103, 110, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990) and quoting *New York v. Ferber*, 458 U.S. 747, 760, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982) ("The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons, selling, advertising, or otherwise promoting the product.")).

[82] H.R. Rep. No. 108-66, Title V, at 62 (2003).

sonable doubt on whether they involve real children.[83] Congress characterizes the pandering provision as "an important tool for prosecutors to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes."[84] The Government argues that, grounded on these findings, the pandering provision allows prosecutions to go forward against persons who not only have the intent to participate in the child pornography market, but who actively solicit others to participate in that market, regardless of whether the government can prove whether the underlying material is real child pornography or not. Without such prosecutorial tools, it argues, the child pornography market will flourish, harming real children.[85]

This argument not only attempts, once again, to revive the rejected market proliferation rationale but also disregards the firmly established principle that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech."[86] And when the "technical reason" is that the material being described or exchanged does not fall within one of the two proscribable categories—but instead is legal child erotica, innocent pictures of children arousing only in the minds of certain viewers, or non-existent—the Government cannot circumvent the criminal procedure process. In a non-commercial setting, in which most child pornography is discussed and exchanged, pan-

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[83] *See* Findings 501 at (10)-(13).

[84] S. Rep. No. 108-2, Title VIII, at 23 (2003) (remarks of Sen. Patrick Leahy).

[85] *See* Findings 501 at (13).

[86] *Free Speech Coalition*, 535 U.S. at 255, 122 S. Ct. at 1404.

dering at most either raises actionable suspicion that illegal materials are possessed[87] or is evidentiary of the social merit of questionable materials. The Government must do its job to determine whether illegal material is behind the pander.

The Government urges that we consider this simply an inchoate crime, arguing that only those with specific intent to traffic in illegal child pornography will be ensnared[88] and noting, for example, that offers to buy or sell illegal drugs can be punished even if no drugs actually exist. However, the inchoate offenses—attempt, solicitation, conspiracy—are covered elsewhere in the code.[89] Further, the intent element only applies to one portion of the provision—promoting material in a

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[87] A number of courts have held that affidavits that defendants had joined Internet e-groups that members used to exchange child pornography provided probable cause to search their home, although there was no evidence that the defendants had ever downloaded any illegal visual depictions. *See, e.g., United States v. Martin*, 426 F.3d 83 (2d Cir. 2005) *petition for cert. filed*, 2006 WL 451674 (U.S. Feb. 16, 2006) (No. 05-1073) (holding that textual email about child pornography exchanged by members of the e-group was not protected speech); *United States v. Coreas*, 426 F.3d 615 (2d Cir. 2005) (same); *United States v. Froman*, 355 F.3d 882 (5th Cir. 2004)(same); *United States v. Hutto*, 84 Fed. Appx. 6 (10th Cir. 2003) (unpublished) (same).

[88] *See* H. R. Rep. No. 108-66 (2003) (stating that the instant pandering provision "bans the offer to transact in unprotected material, coupled with proof of the offender's specific intent."); S. Rep. No. 108-2, at 10 n.6 (2003) (stating that the provision requires the government to establish that the defendant acted with the specific intent to traffic in obscene material or actual child pornography).

[89] *See* 18 U.S.C. § 2252A(b)(1) (which expressly applies to the pandering provision) and 18 U.S.C. § 1466A(a) (criminalizing the attempt or conspiracy to produce or distribute obscene or real child pornography).

manner "that is intended to cause another to believe" it is illicit—and, to be a violator, one need not intend to distribute illegal materials, but only intend that another believe the materials one has are lascivious. Also, a defendant may be liable for promoting, distributing, or soliciting perfectly legal materials that only he or she personally believes are lascivious. As Professor Schauer notes, "when the non-existence of illegality is a function not of the non-existence of an illegal product but rather the non-illegality of an existing product, the First Amendment returns to the picture."[90] Finally, with any inchoate offense the government must show some substantial movement toward completing the crime, must prove, in other words, something beyond mere talk. Under the PROTECT Act pandering provision, mere talk is all that is required for liability and that does not square with Supreme Court First Amendment jurisprudence.

In sum, we recognize that Congress has a compelling interest in protecting children and, to that end, may regulate in interstate commerce settings the distribution or solicitation of the materials described in subsections

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[90] *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing on S. 2520 Before the Senate Comm. On the Judiciary*, 107th Cong. (2002) (testimony of Professor Frederick Schauer). We note that this is also what differentiates the instant pandering provision from state laws that criminalize the pandering of prostitution. While a defendant may be convicted, for example, for soliciting sex from an undercover police officer, even though the officer has no intention of actually consummating the deal, in a jurisdiction that has outlawed prostitution, there is no circumstance under which sex for money may be legal. For this reason, the Government's "phantom" drug analogy is also unpersuasive.

(i) (obscene child pornography) and (ii) ("real" child pornography) of the PROTECT Act pandering provision. However, the pandering provision goes much farther than that. The provision abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep, and the reasons the Government offers in support of such limitations have no justification in the Supreme Court's First Amendment precedents. Accordingly, we find it unconstitutionally overbroad.

H. Williams's Vagueness Challenge

The Government contends that, since the written plea agreement references only Williams's right to appeal his pandering conviction on grounds of overbreadth, he has waived his vagueness challenge. We disagree. We recognize that vagueness and overbreadth doctrines, although "logically related and similar," are distinct.[91] However, plea bargains, as we have noted, are like contracts and should be interpreted in accord with the parties' intent.[92] Further, a written plea agreement should be viewed against the background of the negotiations, avoiding interpretation that directly contradicts an oral understanding; and, because it constitutes a waiver of substantial constitutional rights, should be read, where in doubt, against the government.[93] The record in this case clearly reflects the parties' intent to preserve Williams's constitutional challenges under both overbreadth and vagueness doc-

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[91] *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983).

[92] *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005).

[93] *United States v. Nyhuis*, 8 F.3d 731, 742 (11th Cir. 1993) (quoting *United States v. Jefferies*, 908 F.2d 1520, 1523 (11th Cir. 1990)).

trines.[94] That the written memorialization of that agreement omitted the latter of these related grounds is insufficient to support waiver.

Laws that are insufficiently clear are void for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms.[95] Thus, to pass constitutional muster, statutes challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement.[96] Vagueness concerns are more acute when a law implicates First Amendment rights and a heightened level of clarity and

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[94] Williams's motion to dismiss was expressly raised on grounds that the pandering provision was both overbroad and vague. The remarks of counsel during the plea colloquy reference the parties' agreement that Williams was preserving challenges under both doctrines and the importance of a ruling on that motion to ensure preservation, especially as to the vagueness claim, was discussed at some length by the parties and the court.

[95] *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2298-99, 33 L. Ed. 2d 222 (1972). With respect to chilling effects, the problems of vagueness and overbreadth are, plainly, closely intertwined since those persons covered by the statutes are bound to limit their behavior to that which is unquestionably safe.

[96] *Kolender*, 461 U.S. at 357, 103 S. Ct. at 1858 (1983); *Bama Tomato Co. v. U.S. Dept. of Agriculture*, 112 F.3d 1542 (11th Cir. 1997).

precision is demanded of criminal statutes because their consequences are more severe.[97]

In this case, considering a penal statute that both restricts speech and carries harsh criminal penalties, it is not at all clear what is meant by promoting or soliciting material "in a manner that reflects the belief, or that is intended to cause another to believe" that touted or desired material contains illegal child pornography. This language is so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed. Moreover, the proscription requires a wholly subjective determination by law enforcement personnel of what promotional or solicitous speech "reflects the belief" or is "intended to cause another to believe" that material is illegally pornographic. Individual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates.[98]

Suppose, for example, the government intercepts an email claiming that the attached photographs depict

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[97] *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 499, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982).

[98] *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (holding unconstitutionally vague an anti-loitering ordinance, which defined loitering as remaining in place with "no apparent purpose," finding that standard "inherently subjective because its application depends on whether some purpose is 'apparent' to the officer on the scene."); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) (finding unconstitutionally vague a city ordinance prohibiting speech that "in any manner" interrupts a police officer in the performance of his duties, without limitation to fighting words or to obscene or opprobrious language).

"little Janie in the bath—hubba, hubba!" Does this "reflect a belief" on the sender's part that the photos are lascivious? As discussed above, the law does not require the pandered material to contain any particular content nor, in fact, that any "purported" material need actually exist. Since the "reflects the belief" portion of the statute has no intent requirement, the government establishes a violation with proof of a communication that it deems, with virtually unbounded discretion, to be reflective of perverse thought. Regardless of what is actually depicted in the photos in our example—whether they are innocent baby-in-the-bubbles snapshots or candid stills of the family Rottweiler in a No. 10 washtub—regardless, in fact, of whether *any* photos are attached, this communication could be interpreted as criminal behavior. And because the PROTECT Act's affirmative defense does not apply to the pandering provision, it is no defense to show that the underlying materials are not, in fact, illegal child pornography.

Even more complex is the determination of what constitutes presentation in a "manner that is intended to cause another to believe" that material contains illegal child pornography. Let us consider, for example, an email entitled simply "Good pics of kids in bed." Let us also imagine that the "pics" are actually of toddlers in footie pajamas, sound asleep. Sender One is a proud and computer-savvy grandparent. Sender Two is a chronic forwarder of cute photos with racy tongue-in-cheek subject lines. Sender Three is a convicted child molester who hopes to trade for more graphic photos with like-minded recipients. If what the statute required was a specific intent to traffic in illegal child pornography, the identity of the sender and the actual content of the photos would be probative. Senders One and Two would

be off the hook while Sender Three may warrant further investigation.

But again, the pandering provision requires no inquiry into the actual nature or even existence of the images and provides no affirmative defense that the underlying materials are not, in fact, illegal child pornography. The offense is complete upon communication "in a manner that," in the discretionary view of law enforcement, "is intended to cause another to believe" that materials are illegal child pornography. Here, the "manner" of presentation, as well as the plainly legal underlying material, are identical in all three instances. And Sender Two clearly intended that his recipients believe, however briefly, that the attached photos were sexually explicit depictions of minors.

While posting in a known child pornography chat room would clearly spotlight the true child abuser, in open cyberspace, which of these communicators is a criminal?[99] The pandering provision is devoid of any contextual parameters for the restriction on conduct that might illuminate its meaning and rescue it from vagueness.[100] Absent such a contextual backdrop, the

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[99] *See Reno v. ACLU*, 521 U.S. 844, 876, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997) (recognizing that overly vague restrictions may curtail a significant amount of protected speech in the relatively borderless architecture of the Internet).

[100] *See, e.g., Boos v. Barry*, 485 U.S. 312, 332, 108 S. Ct. 1157, 1169-70, 99 L. Ed. 2d 333 (1988)[ ] (noting that the court's interpretation of the challenged statute as protecting the "peace" was sufficiently precise because of the particular context of the peace of an embassy); *Grayned*, 408 U.S. at 112, 92 S. Ct. at 2304 (finding that an anti-noise ordinance was not vague where it was written specifically to forbid disturbance of schools because "prohibited disturbances are easily measured by their impact on normal activities of the school").

language of this law is too imprecise a standard to provide sufficient guard against arbitrary deprivation of a significant liberty interest.

We again recognize that Congress may regulate the distribution or solicitation of the illegal materials described in subsections (i) (obscene child pornography) and (ii) ("real" child pornography) of the pandering provision. If that were all the provision did, we would find no constitutional infirmity on vagueness grounds. However, the statute is unnecessarily muddled by the nebulous "purported material" and "reflects the belief, or is intended to cause another to believe" language. Because of this language, the pandering provision fails to convey the contours of its restriction with sufficient clarity to permit law-abiding persons to conform to its requirements. Because of this language, the provision is insusceptible of uniform interpretation and application by those charged with the responsibility of enforcing it. Accordingly, we find it impermissibly vague.

III. Williams's Booker *Challenge*

A. Standard of Review

Where, as here, there is a timely objection, we review a defendant's *Booker* claim in order to determine whether the error was harmless.[101] There are two harmless error standards, one of which applies to *Booker* constitutional errors, the other to *Booker* statutory errors.[102] Statutory errors are subject to the less demanding test that is applicable to non-constitutional

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[101] *United States v. Mathenia*, 409 F.3d 1289, 1291 (11th Cir. 2005).

[102] *Id.*

errors.[103] A non-constitutional *Booker* error is harmless if, viewing the proceedings in their entirety, a court determines that the error did not affect the sentence, or had but very slight effect.[104] If one can say with fair assurance that the sentence was not substantially swayed by the error, the sentence is due to be affirmed even though there was error.[105] Because this is a *Booker* statutory error case we will apply that standard.

B. No Reversible Booker *Error*

Williams was assessed (1) a two-level sentence enhancement for use of a computer for transmission, receipt or distribution of child pornography (2) a two-level sentence enhancement for possession of child pornography because the pornographic material at issue involved minors under age twelve, and (3) a four-level sentence enhancement because the material involved portrayed sadistic or masochistic conduct or other depictions of violence. Because these enhancements were applied under a mandatory guidelines scheme, error occurred.[106] However, because Williams admitted to the factual basis for his sentence, which included the facts underlying these enhancements, there was no Sixth Amendment *Booker* error.[107]

We conclude that, viewing the proceedings in their entirety, the sentence was not substantially swayed by the statutory error. Williams was sentenced above the

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[103] *Id.*

[104] *Id.* (citation and internal quotation marks omitted).

[105] *Id.*

[106] *See United States v. Shelton*, 400 F.3d 1325, 1331 (11th Cir. 2005).

[107] *Id.* at 1329-30.

bottom of the 57 to 71 month guideline range for the possession count, and the district court, exercising its discretion, expressly declined his request for a lower sentence within that range. The court also stated that, even if not bound by the guidelines, it had doubts that the sentence would be any lower, and it may have been higher. While the judge declined to issue an alternative sentence in anticipation of *Blakely*'s application to the guidelines given the then-settled state of that issue in this circuit, he explained his decision thoroughly enough that we are confident that he would not lower the sentence in this case on remand.

IV. Conclusion

In the wake of *Free Speech Coalition*, sexually explicit speech regarding children that is neither obscene nor the product of sexual abuse of a real minor retains protection of the First Amendment. We believe the Court's decision in *Free Speech Coalition* leaves Congress ample authority to enact legislation that allows the Government to accomplish its legitimate goal of curbing child abuse without placing an unacceptably heavy burden on protected speech. Certainly Congress took many cues from the Court in drafting the legislation at issue in this case.

Given the unique patterns of deviance inherent in those who sexually covet children and the rapidly advancing technology behind which they hide, we are not unmindful of the difficulties of striking a balance between Congress's interest in protecting children from harm with constitutional guarantees. However, the infirmities of the PROTECT Act pandering provision reflect a persistent disregard of time-honored and constitutionally-mandated principles relating to the

Government's regulation of free speech and its obligation to provide criminal defendants due process. Because we find the PROTECT Act pandering provision, 18 U.S.C. § 2252A(a)(3)(B), both substantially overbroad and vague, and therefore facially unconstitutional, we reverse Williams's conviction under that section. However, because we find no reversible *Booker* error in his sentencing for possession of illegal child pornography, we affirm his sentence of 60-months imprisonment.

CONVICTION REVERSED AND SENTENCE ON COUNT ONE VACATED; SENTENCE ON COUNT TWO AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 04-20299-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WILLIAMS, DEFENDANT

[Filed Aug. 20, 2004]

ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT I OF INDICTMENT

THIS CAUSE comes before the Court upon Defendant's Motion to Dismiss Count I (DE 37) filed on July 14, 2004 ("Motion"). The United States of America filed to the Motion (DE 42) on July 16, 2004. The Court has reviewed the Motion, the entire record and is otherwise fully advised in the premises.

On April 29, 2004, Michael Williams ("Williams") was signed onto a public chat room. A conversation began between Williams and an undercover agent ("Agent"). Where they discussed swapping pictures of their daughters over the internet. Williams invited the Agent to access his photo album on line where the Agent viewed five pictures of a one to two year old child in various poses. As the conversation continued, Williams

requested that the Agent provide pictures. When the Agent failed to produce such pictures, Williams accused the Agent of being a cop. Shortly thereafter, Williams posted a message to the chat room which stated "HERE ROOM: I CAN PUT UP LINK CUZ IM FOR REAL - SHE CAN'T" followed by a hyperlink to child pornography. Based on the above detailed conduct Count One of the indictment charges Williams with violating 18 U.S.C. §2252A(a)(3)(B). On July 19, 2004, Williams plead[ed] guilty to Count I of the indictment but reserved his right to challenge the constitutionality of 18 U.S.C. §2252A(a)(3)(B). Pursuant to Fed. R. Crim. P. 11(a)(2), the plea agreement entered into by Williams and the Government states that the parties "agree that the defendant's right to appeal whether 18 U.S.C. §2252A(a)(3)(B) is constitutionally overbroad under the First Amendment to the U.S. Constitution is preserved." Plea Agreement ¶8.

Accordingly, Williams seeks to have the Court rule that 18 U.S.C. §2252A(a)(3)(B) is unconstitutional on its face because it is vague and overbroad. Thus, Williams seeks to have Count One of the indictment dismissed. 18 U.S.C. §2252A(a)(3)(B) subjects a person to criminal penalties if the person knowingly:

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct.

Williams argues that the statute is unconstitutional because it does not reasonably provide notice as to what it criminalized. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. In determining the sufficiency of the notice a statute must of necessity be examined in light of the conduct with which a defendant is charged." *United States v. Greenpeace, Inc.*, 314 F. Supp.2d 1252, 1258 (S.D. Fla. 2004) (*quoting United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963)). Williams' Motion makes only a peripheral "void for vagueness" challenge. He does not articulate any particular words in the statu[t]e which are so vague that they fail to provide notice. His Motion appears to more appropriately argue his position in terms of an overbreadth challenge. In addition, his plea agreement only refers to his overbreadth challenge. Therefore, in light of the lack of substance of Williams' vagueness argument the Court finds it unnecessary to address the substance of a vagueness challenge to this statute; particularly, where the Court finds that the argument, even if made with more fervor, would not be successful. Defendant also argues that the statute is overbroad because it can be violated without the underlying material actually being child pornography. In its Response, the Government asserts that the speech which the statute criminalizes is not afforded any First Amendment protection.

Standard of Review

Pursuant to Fed. R. Crim. P. 12(b) a defendant can bring a pretrial motion based on "any defense, objection, or request that the court can determine without a trial on the general issues." Fed. R. Crim. P. 12(b)(3)(B) specifically addresses a defendant's ability to bring such a motion to allege a deficiency in the indictment. Where the alleged deficiency in the indictment involves a matter of law and the pertinent facts are not disputed, the motion is proper for disposition by the district court without a trial. *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977);[1] see also *United States v. Torkington*, 812 F.2d 1347, 1154 (11th Cir. 1987). Williams argues that 18 U.S.C. §2252A(a)(3)(B) is unconstitutional on its face. This argument is properly addressed by the district court without the need for a trial as it is purely a matter of law.

Facial Challenges

Williams challenges the statu[t]e, not because of [*sic*] it is inapplicable to his conduct as described above, but because he claims the statute is unconstitutionality [*sic*] on its face. To conduct a facial challenge, the Court must look beyond the facts in the indictment. A facial challenge requires the Court to analyze the statute and its possible applications. Adjudicating this type of challenge gives me pause. The Supreme Court has cautioned federal judges to be ever mindful of the [*sic*] "two of the cardinal rules governing the federal courts[']: "[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of

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[1] The Eleventh Circuit has adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to October 1, 1981. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

constitutional law broader than is required by the precise facts to which it is to be applied." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) (citations omitted). In fact, the Supreme Court recently noted, while deciding a defendant's facial challenge to a federal criminal statute, that such facial challenges are discouraged. *Sabri v. United States*, 124 S. Ct. 1941, 1948 (2004) (discussing how facial challenges require courts to make decisions on fact-poor records and require a relaxation of the standing requirement); *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (discussing the social costs created by the over-breadth doctrine where it blocks prosecution of constitutionally unprotected speech or conduct). Despite this admonition, the Supreme Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." *Id.* (internal citations omitted). Free speech is one of the overbreadth settings listed by the Court in *Hicks*. *Id.* (citing *Broderick v. Oklahoma*, 413 U.S. 601 (1973)). My reluctance to entertain a facial challenge, moreover, is both limited and informed, by the Supreme Court's decisions in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) and *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004),[2] both of which addressed facial First Amendment challenges to recent legislation passed by Congress. The Court's decision in *Ashcroft I* is of particular importance because it decided a facial

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[2] Throughout the remainder of this Order, the Court will refer to *Ashcroft v. Free Speech Coalition*, 535 U.S. 261 (2002) as *Ashcroft I*, so as not to confuse it with *Ashcroft v. American Civil Liberties Union*, 124 S.Ct. 2783 (2004) which recently addressed the First Amendment's effect on the Child Online Protection Act (COPA), 47 U.S.C. § 231.

challenge to the statute which was the predecessor to the statute currently before this Court. *Ashcroft I*, 535 U.S. at 244 (stating that "[t]his case provides a textbook example of why we permit facial challenges to statutes that burden expression"). Therefore, although with substantial reluctance I believe I must decide this case not based merely on the facts presently before the Court, but also upon consideration of what possible protected speech the statute "may unintentionally ensnare." *Id.* at 265 (O'Connor, J., concurring in part and dissenting in part).

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled." *Id.* at 255. As Judge Edmonson has pointed out there has been some disagreement among members of the Supreme Court as to what standard should be employed in a court's analysis of such challenges. *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459 (11th Cir. 1996).[3] Judge Edmonson stated that the disagreement centered on two alternative standards. *Id.* Specifically, some Justices indicated that "a statute is not facially invalid unless there is no set of circumstances in which it would operate constitutionally; others contend the cases require only that a statute would operate unconstitutionally in most cases." *Meggs*, 87 F.3d at 459 (citations omitted). Both of these standards to which Judge Edmonson referred continue to be used in facial challenges in general. Compare *Williams v. Pryor*, 240 F.3d 944, 953 (11th Cir.

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[3] Judge Edmonson's discussion is in the context of a First Amendment case. However, he does not articulate whether or not there is a separate test used specifically for overbreadth challenges. He does note that "facial challenges may succeed more often" as a result of the overbreadth doctrine. *Meggs*, 87 F.3d at 459 n. 2 (citation omitted).

2001) (asserting that a facial challenge will only be successful when it is established that no set of circumstances could be constitutionally applied to the statute) with *Ward v. County of Orange*, 217 F.3d 1350, 1355 (11th Cir. 2000) (stating that a statute is "facially invalid under the First Amendment only if it is [']substantially overbroad, that is, its application would be unconstitutional in a substantial portion of cases[']") (citations omitted).

However, when it comes to facial challenges premised on the First Amendment, it appears that the disagreement as to the applicable [*sic*] is a more subtle one.[4] In fact, the Supreme Court recently articulated the standard in a First Amendment facial overbreadth challenge as allowing a statute to be found invalid only where the challenger

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[4] Justice Kennedy writing for the majority states that under the overbreadth principle a statute "is unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft I*, 535 [U.S.] at 244 (citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). Justice O'Connor, concurring in part and dissenting in part, wrote in Part II of her opinion that litigants who bring facially overbroad challenges "bear the heavy burden of demonstrating that the regulation forbids a substantial amount of valuable or harmless speech." *Id.* at 265. Chief Justice Rehnquist, whom Justice Scalia joined in his opinion, joined in Part II of Justice O'Connor's opinion. Justice Rehnquist further articulated that a statute is not normally struck down on First Amendment grounds "when a limiting construction has been or could be placed on the challenged statute." *Id.* at 268 (*quoting Broadrick*, 413 U.S. at 613). None of these opinions require[s] that a statute be held facially unconstitutional where an individual articulates *an* unconstitutional application. Instead, as indicated by the [*sic*] all of the opinions in *Ashcroft I* and by those in *Hicks* and *Bonner*, the term substantial is key to this analysis. *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). Therefore, finding one standard articulated both by the Supreme Court and the Eleventh Circuit, the Court does not find it necessary to analyze this statutory provision under multiple tests as Judge Edmonson did in *Meggs*.

establishes that the challenged statute prohibits a "[']substantial['] amount of protected free speech, [']judged in relation to the statute's plainly legitimate sweep.[']" *Hicks*, 539 U.S. at 118-119 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). The Eleventh Circuit used nearly identical language when it recently discussed an overbreadth First Amendment challenge. *See Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). This appears to be the standard I should employ in determining if Williams' challenge is a successful one. Therefore, the question is whether Williams has shown that 18 U.S.C. § 2252A(a)(3)(B) prohibits a substantial amount of speech protected by the First Amendment when judged in relation to the legitimate sweep of the statute. With this in mind, the Court turns to the analysis of the statute.

The PROTECT Act of 2003 and Its History

It is undisputed that "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 759 (1982). However, technological advances together with First Amendment concerns present ever growing impediments to achieve this objective. Congress has passed seven different pieces of legislation in an attempt to deal with the problem of sexual exploitation of children.[5]

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[5] The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7 (1978); The Child Protection Act of 1984, Pub. L. No. 98-292, 98 Stat. 204; The Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, 100 Stat. 3510; The Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, § 7511, 102 Stat. 4485; The Child Protection Restoration and Penalties Enhancement Act of 1990, Pub. L. No. 101-647, § 323, 104 Stat. 4816, 4818; The Child Pornography Prevention Act of 1996, Pub. L. No. 104-

The statutory provision at issue in the instant action, 18 U.S.C. § 2252A(a)(3)(B), is the pandering provision of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("The PROTECT Act"), Pub. L. No. 108-21, 117 Stat. 650. Congress passed the PROTECT Act in an effort to respond to the United States Supreme Court's decision in *Ashcroft I*. In *Ashcroft I*, the Supreme Court found sections of the Child Pornography Prevention Act of 1996 ("CPPA"), passed by Congress in 1996, to be unconstitutional. *Ashcroft I*, 535 U.S. at 258. CPPA was one of Congress' first attempts to proscribe child pornography on the internet. The PROTECT Act is Congress' second effort at dealing with the new hurdle of preventing the sexual abuse of children in light of the new markpetplace for child pornography created on the internet.[6]

In drafting the PROTECT Act, Congress began with the premise that "[t]he Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective." Congressional Findings at § 501(3) ("Findings"). In *Ferber*, the Supreme Court recognized that the most "expeditious, if not the only practical method of law enforcement may be to dry up the market" for child pornography. *Id.* (*citing Ferber*, 458 U.S. at 760). However, law enforcement's ability to "dry up the market" has been hindered by new technology. The *Ferber* decision resulted

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208, § 121, 110 Stat. 3009, 3009-26; and the PROTECT Act of 2003, Pub. L. No. 108-21, 117 Stat. 650.

[6] As Senator Hatch articulated in his introduction of the PROTECT Act, "[d]isgusting as child pornography is, the growth of technology and the rise of the internet have flooded our nation with it." 149 Cong. Rec. S231-01, S236-237.

in the eradication of child pornography from adult bookstores. *Id.* at (15). The PROTECT Act seeks to achieve a similar eradication—the cessation of the trafficking of child pornography completely, including, its existence on the internet. *Id.*

The Supreme Court in *Ashcroft I* expressed its doubt about the link between computer generated child pornography and the abuse of children.[7] However, Congress' findings attempt to respond to the Court's skepticism regarding the strength of this link. Congress found that "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." Findings at (7). Furthermore, for the time being, the technology available to create child pornography using virtual children is cost prohibitive. *Id.* at (11). Accordingly, instead of creating child pornography using virtual children, pornographers make it with actual children and escape prosecution using non-cost prohibitive technology to alter the images of real children just enough to cast a reasonable doubt as to the real or virtual nature of the images. *Id.* Moreover, even if the technology necessary to create virtual child pornography becomes cheaper, there is no indication that being able to easily create virtual child pornography will somehow have a positive impact on the rates of sexual abuse of children. *Id.* The argument against child pornography is not based on the proposition that children are sexually

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[7] The Government argued that the "objective of eliminating the market for pornography produced using real children necessitates a prohibition on virtual images as well." *Ashcroft I*, 535 U.S. at 254. The Supreme Court found such "hypothesis [] somewhat implausible," questioning why child pornographers would use real children in the production of their pornography and risk prosecution when they could use virtual children and escape prosecution. *Id.*

abused merely for the creation of child pornography. Rather "the production of child pornography is a by-product of, and not the primary reason for, the sexual abuse of children." *Id.* at (12).

Child sexual abuse is insidious and is already difficult to detect and prevent. The internet has made it even more problematic for society in its efforts to stop the sexual abuse of children. The internet has created a whole new venue for those interested in child pornography. Individuals who sexually abuse children can exchange pictures of the children over the internet, make arrangements to swap children, and make contact with children directly. It is not their ability to communicate over the internet which makes it more difficult to prosecute those who sexually abuse children. It is the ability to escape prosecution by using pictures which falsely appear computer generated. *Id.* at (5). This evasive technique has placed an additional hurdle on the Government wholly created by the use of technology. *Id.* at (9). As a result, there is a decrease in the number of successful child pornography prosecutions because the Government is restricted to only prosecuting those rare child pornography cases where the child in the image can be identified or the origin of the image is known. *Id.* Moreover, this has also resulted in a dramatic increase in the costs of prosecuting these cases. *Id.* at (10). It is the combination of the proliferation of child pornography on the internet and the rising difficulty of prosecuting child pornography cases that prompted Congress to pass the PROTECT Act, which included the provision now before the Court. In analyzing the constitutionality of this section of the PROTECT Act, it is useful to first examine cases which dealt with the constitutionality of previous statutes designed to prevent the proliferation of child pornography.

Child Pornography and the First Amendment

The Supreme Court has held that First Amendment protections are not absolute, but come with some well established limitations. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). These include "limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment." *Ferber*, 458 U.S. at 764. The Supreme Court first addressed the Government's ability to prohibit the promotion and distribution of child pornography in *Ferber*. In *Ferber*, the issue was whether or not a state could proscribe speech which was not obscene, but involved children engaged in sexual conduct. *Ferber*, 458 U.S. at 753. In *Ferber*, two undercover police officers purchased two films from a bookstore which were "devoted almost exclusively to depicting young boys masturbating." *Id.* at 752. The owner of the bookstore was convicted of violating a New York law which controlled the dissemination of child pornography. *Id.* The New York Court of Appeals held that the statute at issue violated the First Amendment. *Id.* In overturning the New York Court of Appeals' decision, the Supreme Court articulated five reasons which supported its decision that "[s]tates are entitled to greater leeway in the regulation of pornographic depictions of children." *Id.* at 756. The reasons articulated in *Ferber* have no less strength today than twenty years ago, when *Ferber* was decided.

The Court began by articulating the state's compelling interest in protecting children based on a democratic society's need for healthy well-rounded children who mature into citizens for its livelihood. *Id.* at 757. Second, distribution of items which memorialize a child's participation in sexual activity is "intrinsically related to the sexual abuse of children in at least two ways." *Id.* at 759.

The harm to a child is aggravated (1) by the child's knowledge that their participation is memorialized and (2) because a permanent record will continue to circulate in the marketplace. *Id.* The Court noted that the market must be closed if "the sexual exploitation of children is to be effectively controlled." *Id.* at 759. The third reason relied on by the Court in determining that states could criminalize the selling or advertising of child pornography was that such conduct provided an economic incentive for people to produce child pornography, the production of which was "illegal throughout the Nation." *Id.* at 762 (citations omitted). The Court also noted that there is little, if any, artistic or literary value to images or performances which include children engaging in lewd sexual conduct. *Id.* at 762. Last, the Court stated that "[r]ecognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not, incompatible with [the Court's] earlier decisions." *Id.* at 763.

The Supreme Court again visited the issue of whether an individual's right to free speech under the First Amendment extends to child pornography in *Osborne v. Ohio*, 495 U.S. 103 (1990). The issue in *Osborne* was whether a state "may constitutionally proscribe the possession and viewing of child pornography." *Osborne*, 495 U.S. at 108 (discussing the issue before the Court in comparison to the Court's decision in *Stanley v. Georgia*, 394 U.S. 557 (1969) where the Court held a statute criminalizing the private possession of obscene material unconstitutional). The Court reasoned that a state has more leeway in proscribing the private possession of child pornography, than the private possession of obscenity because in regulating child pornography the state is not merely concerned about the "poison[ed] minds of its

viewers," but with attempting "to protect the victims of child pornography" and "destroy a market for the exploitative use of children." *Osborne*, 495 U.S. at 109. "Given the gravity of the State's interests in this context, [the Court] f[ou]nd that [the state] may constitutionally proscribe the possession and viewing of child pornography." *Id.* at 111.

It is the gravity of the interests articulated by the states which led the Supreme Court to find that states can proscribe various conduct involving child pornography and not offend the First Amendment. The production, promotion, advertisement, and private possession of child pornography have all been able to be criminalized without running afoul of the First Amendment. The question before this Court is whether Congress' attempt to regulate the pandering of child pornography can survive a facial First Amendment challenge.

Pandering

Williams correctly points out that the statute does not require the speech it prohibits to be child pornography or obscenity. Instead, the statute criminalizes the use of material or purported material which one knowingly uses in a manner to reflect the belief or intend to cause another to believe that the material or purported material is, or includes obscenity or actual child pornography. 18 U.S.C. § 2252A(a)(3)(B). This provision, known as the pandering provision, was intended to be a strong tool for prosecutors to allow them "to punish true child pornographers who for some technical reason are beyond the reach of the normal child porn distribution or production statutes." S. Rep. 108-2 at 23-24. An individual who panders "caters to or profits from the weaknesses or vices of others." RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1401 (2nd ed. 1987). This is not the first time a court has dealt with the

Government's ability to hold an individual criminally liable for promoting material as that which is unprotected despite a finding that the material actually being promoted does not fall outside the First Amendment's protection. *See Ginzburg v. United States*, 383 U.S. 463 (1966).

In *Ginzburg*, an individual was convicted under a federal obscenity statute for the distribution of material which standing alone was not obscene. *Id.* at 464-65. The Court held that the context in which one presented material, including evidence of pandering, could be used to determine if an individual violated a federal obscenity statute. *Id.* at 472-74. The material underlying the defendants' convictions in a neutral environment may not have been considered obscene, however, in an environment where the defendants "proclaimed its obscenity," the Court held the First Amendment was not violated by holding the defendants culpable under the obscenity statute. *Id.* at 472. "[T]he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthen[ed] the conclusion that the transactions" were not constitutionally protected. *Id.* at 474-75. The defendants in *Ginzburg* were not challenging the validity of the statute they were charged with violating. Their challenge was one of the statute's application to their conduct. However, the protection they sought under the First Amendment is similar to that which Williams seeks in the instant case. Just as the *Ginzburg* defendants claimed to those they communicated with that the materials they were offering were obscene, Williams communicated to the chat board that he had access to child pornography and asked them to view it as well. The context involved in the instant case, wherein the Defendant proclaimed the unlawful nature of the materials he

was disseminating, is the same as that in the *Ginzburg* case.

Applying *Ginzburg* to the statutory provision at issue, it becomes clear that Williams' First Amendment challenge must fail. First, the instant statute involved herein is more narrowly targeted than the statute in *Ginzburg*. It criminalizes only pandering. Further, the statute in *Ginzburg* prohibited the mailing of certain obscene, lewd, lascivious, and indecent materials, but the statute in the instant case criminalizes a narrower sector of speech than that criminalized by the *Ginzburg* statute. Moreover, the instant statute was promulgated to serve a more compelling governmental interest than the interest involved in the *Ginzburg* statute. *See Osborne*, 495 U.S. at 111 (discussing the gravity of the state's interest in regulating child pornography compared to the state's interest in regulating obscenity). The combination of these three facts leads the Court to believe that Count One of the indictment charging Defendant with violating 18 U.S.C. § 2252A(a)(3)(B) does not violate the First Amendment. However, before finishing our analysis[,] it is necessary to examine the effect of *Ashcroft I* on Williams' facial challenge.

Ashcroft v. Free Speech Coalition

Williams relies on the Supreme Court's recent decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) in arguing that the statute at issue is unconstitutional. In *Ashcroft I*, the Unites States Supreme Court held that two provisions of the Child Pornography Prevention Act of 1966 (CPPA) were overbroad and thus unconstitutional. *Id.* at 256 (holding 18 U.S.C. § 2256(8)(B) and 18 U.S.C. § 2256(8)(D) unconstitutional). Section 2256(8)(B) "prohibit[ed] "[']any visual depiction, including any

photograph, film, video, picture, or computer or computer-generated image or picture,[’] that [‘]is, or appears to be, of a minor engaging in sexually explicit conduct.[’]” *Id.* at 241 (quoting 18 U.S.C. § 2256(8)(B)). “Section 2256(8)(D) define[d] child pornography to include any sexually explicit image that was [‘]advertised, promoted, presented, described, or distributed in such a manner that conveys the impression[’] it depicts [‘]a minor engaging in sexually explicit conduct.[’]” *Id.* at 242 (quoting 18 U.S.C. § 2256(8)(D)). 18 U.S.C. § 2256(8)(D) was the section of the CPPA directed at images pandered as child pornography. *Id.* at 242 (citing S. Rep. No. 104-358, p. 22 (1996)).

There is only a small portion of the *Ashcroft I* decision devoted to the discussion of the pandering provision at issue in that case. See *id.* at 257-259. However, the Court looks to the decision as a whole for guidance on the issue of the First Amendment’s applicability to child pornography. The *Ashcroft I* opinion begins by noting that in order to uphold the CPPA, the Court would have to hold that virtual child pornography should be added to the list of categories of unprotected speech. *Id.* at 246. The Court rejected that principle and stated that child pornography is not without First Amendment protection because of its content, but because the images depicted in child pornography are the result of the sexual abuse of children. *Ashcroft I*, 535 U.S. at 249. After an examination of the *Ferber* and *Osborne* opinions, which the Court stated were rooted in a concern for those who participate in child pornography, the Court found that “[v]irtual child pornography [wa]s not “intrinsically related” to the sexual abuse of children.” *Ashcroft I*, 535 U.S. at 250 (internal citations omitted).

In *Ashcroft I*, the Government argued that virtual child pornography, despite the lack of involvement of actual children, should be constitutionally proscribed because (1) virtual child pornography can be use by pedophiles to seduce children; (2) virtual child pornography encourages pedophiles to abuse children by whetting the appetites of pedophiles; (3) when virtual child pornography and actual child pornography are indistinguishable, the trafficking in virtual pornography promotes the trafficking in child pornography produced using actual children; and (4) it is difficult to prosecute child pornography cases where even expert witnesses cannot determine if the images at issue were created using real children or virtual images. *Ashcroft I*, 535 U.S. at 251-255. The Supreme Court was not persuaded by any of these arguments. In *Ashcroft I*, the Court did not find any support in First Amendment law for a limitation of free speech based on the reasons articulated by the Government. *Id.* The Court found 18 U.S.C. § 2256(8)(B) overbroad and unconstitutional. *Id.* at 256.

At the end of its opinion, the Court turned to the second section of the CPPA at issue in the case, 18 U.S.C. § 2256(8)(D). *Id.* at 257. This provision banned "depictions of sexually explicit conduct that are [']advertised, promoted, presented, described, or distributed in such a manner that conveys the impressions that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.[']" *Id.* (quoting 18 U.S.C. § 2256(8)(D)). While this section of the CPPA was aimed at pandering, it also prohibited possession of the material described above. *Id.* at 258. Individuals who were merely in possession of materials that were not child pornography, but that had previously been pandered as child pornography at some point, could be held criminally liable

under this statute without ever having been involved in the pandering. *Id.* The Court found that this restriction on speech was too broad to find support in the rationale of *Ginzburg*. *Id.* In addition, the Court stated that the legislative findings were silent as to the harm posed by material being pandered as child pornography. *Id.* Therefore, the Court held that 18 U.S.C. § 2256(8)(D) was overbroad in violation of the that First Amendment. *Id.*

18 U.S.C. § 2252A

Williams argues that 18 U.S.C. § 2252A(a)(3)(B) suffers the same infirmities as 18 U.S.C. § 2256(8)(D), the pandering provision addressed by the Court in *Ashcroft I*. Accordingly, Williams asserts that 18 U.S.C. § 2252A(a)(3)(B) similarly violates the First Amendment and is overbroad. While there are similarities between the two statutes, they are not dispositive. First, both statutes were passed in an attempt to hold individuals who promote child pornography criminally liable. Second, as the Government points out it their Response, both statutes are "content neutral in that the material being promoted as containing child pornography need not actually contain child pornography." Response at 5. As articulated in this Court's discussion of *Ginzburg*, neither of these facts necessarily induce[s] a finding that this statute prohibits a substantial amount of speech protected by the First Amendment. Instead, the dispositive question before this Court[] is if the statute prohibits a "[']substantial['] amount of protected free speech, [']judged in relation to the statute's plainly legitimate sweep.[']" *Hicks*, 539 U.S. at 118-119 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)).

18 U.S.C. § 2252A(a)(3)(B) prohibits an individual from knowingly presenting, advertising, or promoting material in a manner which is intended to persuade the recipient of such communication that the underlying material is either obscene or actual child pornography. The statute only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornograpy. Unlike the pandering section at issue in *Ashcroft I*, 18 U.S.C. § 2252A(a)(3)(B) does not criminalize mere possession of material. This statute prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment.

The statutes at issue in *Ashcroft I* were aimed at defining child pornography. *Ashcroft I*, 535 [U.S.] at 24. This statute does not attempt to change the definitions of obscenity or child pornography. It criminalizes the pandering of material involving either category of speech, both of which states have been able to regulate without violating the First Amendment.

Furthermore, any First Amendment protection *Ashcroft I* provides for virtual child pornography is not implicated by the language of this statute. The child pornography prong of the statute explicitly requires that the individual pandering the material must knowingly pander the material as material involving the a [*sic*] visual depiction of an actual minor. See 18 U.S.C. § 2252A(A)(3)(B)(ii) (emphasis added). If an individual was to pander material as computer generated child pornography their conduct would fall outside of the

statute.[8] Therefore, the Court's concern for First Amendment protection of computer generated pornography is not present in the instant statute.

Another concern articulated by the Court in *Ashcroft I* which is not present in the instant case is the lack of legislative findings which addressed the harm caused by material being pandered as child pornography. *Ashcroft I*, 535 U.S. at 257. Relying in part on the Supreme Court's analysis in *Ferber*, Congress articulated the harm of pandering child pornography being that the existence of a market for child pornography causes real children harm. Findings at (3) (citing *Ferber*, 458 U.S. at 760). Individuals who solicit others based on their interest in child pornography are integral to the existence of a child pornography market. While such a market can no longer exist in bookstores, it can and does exist over the internet. The Government has an interest in "stamping out the vice of child pornography at all levels in the distribution chain." Findings at (2) (citing *Osborne*, 495 U.S. at 110). The instant pandering provision "bans the offer to transact in unprotected material, coupled with proof of the offender's specific intent." H.R. Conf. Rep. 108-66, 2003 U.S.C.A.N. 683, 696. Such offers are one level of the distribution chain which make up the market for child pornography. The Supreme Court has on at least two occasions, both in *Ferber* and *Osborne*, recognized that a state's interest in squelching the market for child pornography is related to the sexual abuse of children. The move of this market

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[8] Of course it is possible that a computer generated visual depiction of a minor engaging in sexually explicit behavior could violate the statute under subsection (i) if it is obscene. However, that prong passes constitutional muster under *Ginzburg*, *Roth*, and *Miller*. *Ginzburg*, 383 U.S. 463; *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973).

from bookstores to the internet should not weaken the link between the child pornography market and the sexual abuse of children which caused the Court to determine that states could proscribe conduct involving child pornography with less likelihood of running afoul of the First Amendment. The market's existence on the internet does not change the fact that it is a "market for the exploitative use of children." *Osborne*, 495 U.S. at 109.

The legislative findings of the PROTECT Act also articulate the Government's interest in being able to effectively prosecute child pornographers. Where images can be altered so as to cast a reasonable doubt on whether or not they involve real children, it has become more difficult to successfully prosecute possession of child pornography cases. Findings at (10). A pandering provision, such as the one currently before the Court, allows prosecutions to go forward against individuals who, not only have the intent to participate in the child pornography market, but actively solicit another to participate, regardless of if the Government can prove the underlying material is real child pornography or not.[9] Without such prosecutorial tools, individuals will continue to proliferate the child pornography market while escaping any real threat of prosecution. Findings at (13). This Court is satisfied that in contrast to the legislative findings in *Ashcroft I*, the instant legislative findings articulate a harm produced by the conduct proscribed such that its proscription does not violate the First Amendment.

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[9] In addition, this pandering provision by including the "purported material" language may permit a prosecution to go forward where the individual who panders does not follow through in the transmission of the underlying materials. See Anne M. Coughlin, Letter to Senator Leahy, November 28, 2002, 149 Con[g]. Rec. S231-01, S244.

The First Amendment does not thwart this product of Congress' persistent efforts to protect real children from child pornography and sexual abuse. The Congressional findings of the PROTECT Act and the statutory provision at issue display Congress' attempt to follow *Ferber* and *Ginzburg* in an attempt to respond to any First Amendment concerns while eradicating child pornography. If there is any protected speech which this statute prohibits, it is not substantial, particularly in light of the statute's logical sweep. This statute is a legitimate effort to close the market for child pornography, which has seen a revival as a result of technology. The Supreme Court has acknowledged that destroying the market for child pornography is one step we can take in putting an end to the sexual abuse of children. *See Ferber*, 458 U.S. at 759; *see also Osborne*, 495 U.S. at 109. I agree with Justice Rehnquist that "[t]he First Amendment does not . . . protect the panderer" of child pornography depicting actual children. *Ashcroft I*, 535 U.S. at 272 (J. Rehnquist, dissenting). Congress has passed a statute which is more specifically tailored to its objective, the desire to extinguish the market for actual child pornography, than the pandering provision at issue in *Ashcroft I*. Based on the foregoing, I find that Count One of Williams' indictment survives his constitutional challenge and should not be dismissed.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is DENIED.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 20 day of August, 2004.

/s/ DONALD M. MIDDLEBROOKS
DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

cc: counsel of record

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15128-JJ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL WILLIAMS, DEFENDANT-APPELLANT

On Appeal from the United Sates District Court
for the Southern District of Florida

[Filed: July 17, 2006]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT, WILSON AND REAVLEY*, Circuit Judges.

PER CURIAM:

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* Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ROSEMARY BARKETT
UNITED STATES CIRCUIT JUDGE

APPENDIX D

Congressional Findings Relating to Obscenity and Child Pornography

Pub. L. 108-21, Title V, § 501, Apr. 30, 2003, 117 Stat. 676, provided:

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under *Miller* v. *California*, 413 U.S. 15 (1973) (obscenity), or *New York* v. *Ferber*, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," *New York* v. *Ferber*, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. *Osborne* v. *Ohio*, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Ferber*, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided *Ferber*, the technology did not exist to—

(A) computer generate depictions of children that are indistinguishable from depictions of real children;

(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or

(C) disguise pictures of real children being abused by making the image look computer-generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since *Ferber* have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated. Such

challenges increased significantly after the decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002).

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact of the *Free Speech Coalition* decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in *Free Speech Coalition*. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in *Free Speech Coalition*, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful. In addition, the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before.

(11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

(12) Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.

(13) In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the

technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

(14) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(15) The Supreme Court's 1982 *Ferber* v. *New York* decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.

APPENDIX E

18 U.S.C. 2252A (2000 & Supp. IV 2004) provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

for purposes of inducing or persuading a minor to participate in any activity that is illegal.[1]

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, Section 1591, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, or sex trafficking of children, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

---

[1] So in original.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

(1)

No. 06-694

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

PARTIES TO THE PROCEEDING

Parties to the proceedings are those listed in the caption of this case.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Michael Williams, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the court of appeals is set forth in Petitioner's Brief (Pet. App. A) and is reported at 444 F.3d 1286. The opinion and order of the district court is also set forth in Petitioner's Brief (Pet. App. B) (Pet. App., *infra*, 46a-69a) and is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (Pet. App., *infra*, 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 14, 2006, and on November 6, 2006, he further extended the time to and including December 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. Section 2252A of Title 18 of the United States Code provides in part:

(a) Any person who – * * * *

(3) knowingly – * * * *

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains –

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct; * * * shall be punished [by fine and imprisonment]. 18 U.S.C. §2252A(a)(3)(B) (2000 & Supp. IV 2004).

STATEMENT OF THE CASE

The Respondent, Michael Williams, was the defendant in the district court and will be referred to as "Mr. Williams." The Petitioner, United States of America, will be referred to as "the government."

Mr. Williams is incarcerated in the Federal Bureau of Prisons. On May 13, 2004, Mr. Williams was charged in a two-count indictment with promoting and distributing child pornography in violation of Title 18 U.S.C. §2252A(a)(3)(B) and (b)(1) (Count I) and with possession of child pornography in violation of Title 18 U.S.C. §2256(8)(A) and (B) (Count II). (R1:7).

On July 14, 2004, Mr. Williams filed a motion to dismiss Count I of the indictment on the grounds that the applicable statute was vague and overly broad. (R1:37). That motion was orally denied by the district court on July 19, 2004. A written order was subsequently filed on August 20, 2004. (R1:49).

On July 19, 2004, pursuant to a written plea agreement, Mr. Williams pled guilty to Counts I and II of the indictment. (R1:43). Mr. Williams, however, specifically preserved his right to appeal the order denying his motion to dismiss Count I of the indictment.

On September 22, 2004, the district court sentenced Mr. Williams to sixty (60) months of imprisonment as to Counts I and II, to run concurrently, followed by a term of supervised release for two (2) years and a $200.00 special assessment fee.

Factual Background

On April 26, 2004, SA Devine was signed onto YIRC on a computer located at the United States Secret Service ("USSS") Miami Field Office, Miami, Florida, using the undercover screen name "Lisa_n_Miami" ("LNM"). SA Devine entered a child exploitation chat room entitled "per ten's action uncensored: 1" and observed a public message

from the user "Twatjuicesucker2004" (T4) stating, "Dad of toddler has 'good' pic's of her and me for swap for your toddlers pics, or live cam." PSI at ¶ 6. SA Devine contacted T4 via private message and identified himself as a 30-year-old female mother of a ten-year-old daughter. T4 stated his daughter was two years old and asked LNM to swap photographs of their daughters. T4 stated he had five photographs of his daughter. He also stated he permitted his friends for the "the internet" to travel to Key Largo and engage in sexual activity with his daughter, "for a small price: like a case of Icehouse beer or something." T4 stated that LNM could engage in sexual activity with his daughter if LNM would bring her daughter for him to look at. In addition, T4 told LNM he engaged in sexual activity with an 11-month-old child and he had nude photographs of his daughter "in folder on puter." PSI at ¶6.

Utilizing the YIRC file transfer system, T4 sent photographs to LNM. This file contained a photograph displaying the body of a two to three-year-old white child lying on a couch wearing a bathing suit. Using the YIRC file transfer system, LNM sent T4 an age regression photograph of a ten to twelve-year-old female. T4 stated, "I've got hc pictures of me and dau, and other guys eating her out – do you??" HC allegedly is internet slang for "hard core." PSI at ¶ 7.

On this same date, SA Devine accessed the "Photo Album" section of T4's YIRC profile. This section contained five photographs of a white female child approximately one to two years old in various poses. One of the photographs depicted the child with her breast exposed and her pants down just below her waistline. In addition, one other photograph depicted the same child and another female approximately eight to ten years old. PSI at ¶ 8.

Also on April 26, 2004, SA Devine observed T4 post public messages in the "per ten's action uncensored: 1" chat room accusing LNM of being a police officer and a fake. In response to these postings, SA Devine posted public messages in the "per ten's action uncensored: 1" chat room about T4 being a police officer and a fake. PSI at ¶ 9. SA Devine then observed T4 post the hyperlink http://fl.pgbriefcase.yahoo.com in the "per ten's action uncensored: 1" chat room. SA Devine accessed the Yahoo briefcase via the http://fl.pgbriefcase.yahoo.com hyperlink. This briefcase contained photographs of nude children, approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity. PSI at ¶ 10.

On April 27, 2004, SA Devine served a subpoena on Yahoo Internet Services for all customer information, including e-mail address and Internet Protocol (IP) report, related to the T4 username. On April 24, 2004, a Yahoo Internet Services representative stated that the T4 username was assigned to e-mail address Twatjuicesucker2004 @Yahoo.com. The Yahoo representative also stated that "Twatjuicesucker2004@Yahoo.com" was accessed from IP addresses 12.77.240.152 on April 25, 2004 at 15:47:49 hours, 12:77.240.16 on April 22, 2004 at 20:06:57 hours, 12.77.238.168 at 19:49:37 hours. SA Devine conducted a "SamSpade.com" online inquiry for the above IP addresses. This inquiry revealed that these IP addresses were assigned to AT&T WorldNet Services. PSI at ¶ 11.

On April 29, 2004, the U.S. Attorney's Office served a subpoena on AT&T WorldNet Services for all customer and billing information, including Automatic Numeric Identification (ANI) information for the above mentioned IP addresses. On the this same date, AT&T WorldNet Services Investigation Department stated that the above IP

addresses were assigned to Michael Williams, 34 Avenue A, Key Largo, Florida. AT&T WorldNet Services also indicated that the Williams' AT&T e-mail address was "Miamimike50@WorldNet.AT&T.net" and Visa account number 4313 0340 9638 6312 was billed for Williams' Internet service. In addition, AT&T WorldNet Services stated the ANI for these IP addresses was (305) 451-3216. PSI at ¶ 12. Inquiries conducted through an online Autotrack and the Florida Department of Highway Safety and Motor Vehicles revealed an address of 34 Avenue A, Key Largo, Florida, and Florida driver's license number W452-554-48-381-0. In addition, SA Devine conducted an online "Primeris Phone Finder" inquiry for telephone number (305) 451-3216. This inquiry revealed the above telephone number was assigned to the Key Largo switch or network of BellSouth Telecommunications. PSI at ¶ 13.

On or about April 29, 2004 Special Agents of the Miami Electronic Crimes Task Force ("MECTF") sought and obtained a federal search warrant for 34 Avenue A, Key Largo, Florida and any computers located therein. Said property and items belonged to Mr. Williams. They executed the search warrant on April 30, 2004. Inside the trailer, agents found two computers containing a total of three hard drives. On the computers examined, agents allegedly found approximately 20-25 images depicting children under the age of 18 engaged in various sexual activity. On April 30, 2004, Mr. Williams was arrested and taken into custody. PSI at ¶ 12-13.

REASONS FOR DENYING THE PETITION

The Eleventh Circuit Court of Appeals correctly determined that Section 2252A(a)(3)(B) of the Prosecutorial Remedies and Other Tools to End the Exploitation of the Children Today Act of 2003 (Protect Act) was unconstitutionally vague and overbroad on its face. The Eleventh Circuit carefully and thoroughly reviewed the long history of pornography and child pornography laws and statutes as well as the policies on which those laws and statutes were based.

After a comprehensive analysis, the Eleventh Circuit correctly determined that Section 2252A(a)(3)(B) is unconstitutionally vague and overbroad.

A. THE ELEVENTH CIRCUIT COURT OF APPEAL'S OPINION DOES NOT WARRANT REVIEW BY THIS COURT

The Eleventh Circuit correctly recognized and concluded that Congress's attempt to remedy the provisions of the Child Pornography Prevention Act (CPPA) that were earlier held unconstitutional by this Court fell short of the mark. Although Congress intended to ban the "offer to transact" (or pandering) in proscribable child pornography, Section 2252A(a)(3)(B) did much more in the way of criminalizing protected speech making it virtually impossible to discern what conduct is protected and what conduct is prohibited. The opinion of the Eleventh Circuit properly invalidated Section 2252A(a)(3)(B) and that opinion does not warrant review by this Court.

B. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY FOUND THAT SECTION 2252A(a)(3)(B) WAS UNCONSTITUTIONAL AND OVERBROAD

18 U.S.C. §2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography (*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. §2252A(a)(3)(B) (Supp. IV 2004). Congress passed Section §2252A(a)(3)(B) in the wake of *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

The Eleventh Circuit recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App., *infra*, 19a. The Eleventh Circuit further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a. The Eleventh Circuit also rejected the government's argument that because Mr. Williams' written plea agreement referred only to a right to challenge his conviction on overbreadth grounds, the agreement did not preserve a right to challenge the conviction on vagueness grounds. Pet. App., *infra*, 37a-38a.

The Eleventh Circuit noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App., *infra*, 16a. Congress accomplished this by moving the pandering provision "from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The Eleventh Circuit also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

The Eleventh Circuit correctly held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. Pet. App., *infra*, 37a, 42a, 45a, 41b. In addressing Mr. Williams' overbreadth challenge, the Eleventh Circuit noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." App., *infra*, 21a. This was so, the Eleventh Circuit concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Ibid.* Because in the Eleventh Circuit's view, however, Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the Eleventh Circuit went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a. In so doing, the Eleventh Circuit

reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. Pet. App., *infra*, 22a.

First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the Eleventh Circuit was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the Eleventh Circuit found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 23a. The Eleventh Circuit stated that under Section 2252A(a)(3)(B), the intent to traffic in illegal pornography "only applies to one portion of the provision – promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 36a.

Accordingly, the Eleventh Circuit concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. Pet. App., *infra*, 35a-36a.c. With respect to Mr. Williams's vagueness argument, the Eleventh Circuit was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with

proof of any communication deemed "reflective of perverse thought." Pet. App., *infra*, 40a. The Eleventh Circuit further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was even more complex. *Id.* at 39a. In the Eleventh Circuit's view, the provision would capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Id.* at 40a-41a.

SUMMARY OF THE ARGUMENT

Title 18 U.S.C. §2252A(a)(3)(B) is unconstitutionally vague and overbroad on it's face because it criminalizes conduct and material based upon what another person "may believe" contains is child pornography, even if the conduct or material really does not, in fact, involve child pornography. By criminalizing conduct that may not involve child pornography and by making that conduct criminal based upon what someone *may* "believe" the material contains child pornography, the statute violates the First Amendment to the United States Constitution.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

I. AS THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH AND SUPPORTED BY THIS COURT'S PRECEDENCE ON THE ISSUE OF THE VOID FOR VAGUENESS DOCTRINE, NO REVIEW IS NECESSARY

The Eleventh Circuit was correct when it held that 18 U.S.C. §2252A(a)(3)(B) was unconstitutionally vague and overbroad on its face. Section 2252A(a)(3)(B) improperly criminalizes conduct dependent upon beliefs, appearances and impressions, rather than facts. Constitutional free speech demands bright line rules, not gray areas which abound in Title 18 U.S.C. §2252A(a)(3)(B) and which subjects a person to criminal penalties if the person knowingly:

"(B) advertises, promotes, presents, distributes or solicits through the mails, or in interstate of foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains . . .

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct."

This statute contains several infirmities. **One**, it does not reasonably provide notice as to *what is* criminalized. **Two**, it is unconstitutionally vague. **Three**, it is unconstitutionally overbroad. The Supreme Court recognizes the validity of facial attacks on overbroad statutes affecting

constitutional rights, one of those being free speech. *Virginia v. Hicks*, 593 U.S. 113 (2003), citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The Overbreath Doctrine prohibits the government from banning unprotected free speech if a substantial amount of protected speech is prohibited or chilled. *Ashcroft v. Free Speech Coalition*, 535 U.S. 261 (2002).

The statute in question is commonly called the "pandering" provision of the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003 ("The Protect Act"), Pub. L. No. 108-21, 117 Stat. 650. Congress passed the Protect Act in an effort to respond to the United States Supreme Court's decision in *Ashcroft I*. In *Ashcroft I*, the Supreme Court found a similar section of the Child Pornography Prevention Act of 1996 ("CPPA") passed by Congress in 1996, to be unconstitutional. *Ashcroft I*, 535 U.S. at 258. The CPPA was one of Congress' first attempts to proscribe child pornography on the internet. The Protect Act was Congress' second attempt. But like its predecessor statute, this particular pandering provision of the Protect Act also suffers from similar constitutional infirmities.

In *Ashcroft v. The Free Speech Coalition,* 535 U.S. 234 (2002), the legal challenge was to Title 18 U.S.C. §§2256(8)B and 2256(8)D. This Court ruled *both* sections overbroad and unconstitutional.

Title 18 U.S.C. §2256(8)D was found to be overbroad substantially because the determination turned on how the speech was presented not on what was depicted. Title 18 U.S.C. §2256(8)B banned a range of sexually explicit images, sometimes called "virtual" child pornography that appeared to depict minors but were produced by means

other than using real children such as youthful looking adults or computer technology. This Court held that the overbreadth doctrine protected the government from banning unprotected speech if the substantial amount of protected speech prohibited or chilled in the process. Basically, the Court held that there was an insufficient government interest that criminalizing virtual child pornography left unprotected a substantial amount of speech not tied to the government interest in distinguishing images produced using real children from virtual ones.

In *Ashcroft,* this Court held that the words "appears to be" and "conveys the impression" provisions were both overbroad and vague, chilling production of works protected by the First Amendment. The statute at issue in this case, the Protect Act, suffers from the same type of constitutional infirmity. That is, there is no meaningful distinction between the words that this Court found objectionable in *Ashcroft* – "Appears to be" and "conveys the impression" – and the words used in the statute at issue – "reflects the belief or that is intended to cause another to believe." "Reflects the belief" just as vague and overbroad as "appears to be" and "conveys the impression." In short, just as its predecessor statute was unconstitutionally vague and overbroad, so too is the current statute unconstitutionally vague and overbroad and, pursuant to *Ashcroft*, the holding of the Eleventh Circuit Court should be affirmed and the Petition denied.

The best way to demonstrate the constitutional infirmity of the statute at issue is by looking at a practical example. Six (random) people are sitting on a bus bench. John Doe walks by and says to all of them, "I've got some great juicy pictures of hot young babes." The six people are

then separated and individually asked what they think the images contain that John Doe is talking about.

Person 1 says, "Pamela Anderson in her skimpy red bikini on the beach in a scene from Baywatch." **Person 2** says, "the recent paparazzi shots taken under the dress of Britney Spears as she was getting into her Mercedes Benz SLR." **Person 3** says, "I really have no clue." **Person 4** says, "they are probably revealing photos of young girls who might be under age, but then again, maybe not." **Person 5** says, "he's got nude photos of underage girls." **Person 6** says, "I think he has one of those videos from 'Girls Gone Wild', you know, those videos of college girls on spring break promoted by Snoop Dog which are advertised on late night television."

Do we indict and convict John Doe? Of course not. How can we? Ambiguous words which can be subjectively interpreted in many ways, some of which would make John Doe a law violator and others not, cannot become prohibited speech. As despicable as child pornography is, the Eleventh Circuit forcefully recognized that " . . . Congress may not 'burn the house to roast the pig.' "

CONCLUSION

The Eleventh Circuit Court of Appeals ruled correctly. Title 18 U.S.C. §2252A(a)(3)(B) is unconstitutionally vague and overbroad. The Free Speech Clause of out First Amendment cannot mean anything if a person in this country can be arrested, prosecuted, convicted and imprisoned for using a poor choice of words, which, depending on what somebody else interprets same to mean – even if, in reality, what the speaker is actually talking about, is, in fact, totally harmless, or worse yet – non-existent. Mr. Williams respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Respondent offers no reason for this Court to leave unreviewed the court of appeals' holding that 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) is unconstitutionally vague and overbroad. Section 2252A(a)(3)(B) proscribes knowingly "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography. In striking down that statutory provision in all its applications, the court of appeals misconstrued the scope of the law and misapplied well-established overbreadth and vagueness principles. Respondent suggests that the court of appeals was correct, but this Court generally reviews decisions striking down an Act of Congress as unconstitutional to determine for itself whether the statute is compatible with the Constitution. That course is particularly appropriate

here both because the case involves an effort to bring the law into conformity with the Court's precedents and because the case implicates the compellingly important context of regulating conduct that supports the illicit child pornography market.

1. The decision below declares an Act of Congress unconstitutional on its face. Pet. App. 1a. The decision warrants this Court's review for that reason alone. As the petition explains (at 4-7, 13-14), Section 2252A(a)(3)(B) reflects Congress's effort to comply with this Court's decision in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In response to the concern expressed in *Free Speech Coalition* that the "pandering" provision at issue there "punishe[d] even those possessors who took no part in pandering," *id.* at 242-243, Congress sought in Section 2252A(a)(3)(B) to ban the pandering itself: "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent." S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003). Congress has the power to proscribe such offers, and the court of appeals' decision should not be allowed to stand without plenary review of the statute by this Court.

2. The only reason respondent provides (Br. in Opp. 12-16) for denial of certiorari review is his contention that the decision below is correct. First, he argues (*id.* at 14) that the text of Section 2252A(a)(3)(B) is vulnerable under *Free Speech Coalition* because the statute's use of the phrase "reflects the belief, or * * * is intended to cause another to believe" is indistinguishable from the phrases "[a]ppears to be" and "conveys the impression" invalidated in *Free Speech Coalition*. But respondent's attempted equation of the invalidated phrases with Section 2252A(a)(3)(B)'s language fails for several reasons.

Significantly, the context and meaning of the phrases in Section 2252A(a)(3)(B) are entirely different. The two provisions in *Free Speech Coalition* expanded the definition of what constitutes child pornography, 535 U.S. at 241, and the Court concluded that the definitions were overbroad in part because depictions that "appear[] to be" child pornography may well be constitutionally protected. *Id.* at 244-251. But, as the court of appeals here recognized (Pet. App. 16a-18a), Section 2252A(a)(3)(B) "targets only the act of pandering" or soliciting depictions that are, as represented, constitutionally unprotected; it does not regulate underlying depictions at all. The current statute also does not "prohibit[] possession of material described, or pandered, as child pornography by someone earlier in the distribution chain," as did the "conveys the impression" provision struck down in *Free Speech Coalition*. 535 U.S. at 257-258. Nor does the decision in *Free Speech Coalition* lend any support to respondent's vagueness argument; the Court invalidated the statutory provisions in question as overbroad, not as vague. *Id.* at 258. And the Court recognized that "[t]he Government, of course, may * * * enforce criminal penalties for unlawful solicitation." *Id.* at 251-252. That is exactly what Section 2252A(a)(3)(B) does. Accordingly, the appropriate constitutional analysis here focuses on whether Congress has validly trained on speech that purports to solicit or offer "what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a.

Respondent's remaining arguments, based on a hypothetical (Br. in Opp. 14-15), merely expose the fatal flaws in the court of appeals' reasoning. The court of appeals read

the law more broadly than its language warrants. See Pet. App. 22a-26a, 35a-36a, 38a-42a. Limited to its proper scope, the statute is neither vague nor overbroad, and it is completely consistent with the Constitution.

Section 2252A(a)(3)(B) makes it unlawful to offer or to solicit material that is or purports to be illegal contraband, specifically, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) (Pet. App. 77a-78a). Properly construed, the provision contains both an objective and a subjective intent requirement. See Pet. 15-16. As for the objective component, the law requires that a reasonable person must conclude from the language and context of the communication (its "manner") that the speaker has the "belief" that illegal child pornography is available or desired, or that the communication is "intended to cause another to believe" that the advertised, promoted, or solicited material is illegal child pornography. 18 U.S.C. 2252A(a)(3)(B) (2000 & Supp. IV 2004) (Pet. App. 77a). As for the subjective component, the law requires that a speaker must have the specific intent to traffic (or purport to be trafficking) in child pornography, *i.e.*, that the communication be made "knowingly." *Ibid.*; see *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).* Those objective and subjective requirements protect against improper applications of the law and give it the requisite clarity. See Pet. 16-21.

Far from demonstrating the correctness of the court of appeals' opinion, respondent's hypothetical example (Br. in

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* See H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003) ("[T]he government establishes a violation with proof of the communication and requisite specific intent."); S. Rep. No. 2, *supra*, at 12 (noting that the provision requires "proof of the offender's specific intent").

Opp. 14-15) illustrates the court's error. If a man walked by six strangers sitting on a bus bench and said "I've got some great juicy pictures of hot young babes" (*id.* at 14), his statement would not fall within the proscription of Section 2252A(a)(3)(B). A reasonable person could not conclude from the language and context of that communication that the speaker believes that he is offering illegal child pornography or that the speaker intends those listeners to so conclude. Furthermore, nothing in the hypothetical suggests that the speaker subjectively understands that a reasonable person would so construe his statement. Respondent's hypothetical—like the hypothetical examples given by the court of appeals (Pet. App. 40a-41a)—cannot justify the court's conclusion that the statute encompasses "a substantial amount of lawful speech in relation to its legitimate sweep," *id.* at 37a, or that the statute "fails to convey the contours of its restriction with sufficient clarity," *id.* at 42a.

As explained in the certiorari petition (at 16-19), even assuming that the statute encompasses some actual instances of protected speech, "that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell* v. *FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia* v. *Hicks*, 539 U.S. 113, 119-120 (2003)). Certainly nothing in this record would justify such a conclusion, and the court of appeals did not even undertake the appropriate analysis to quantify and compare the supposed protected applications with the proscribable ones. Even assuming that the statute covers some protected speech, any such speech can be protected through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *New York* v. *Ferber*, 458 U.S. 747, 773-774 (1982). There is

no basis for the court of appeals' holding that Section 2252A(a)(3)(B) is unconstitutional in all its applications.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL WILLIAMS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL LAW CENTER FOR CHILDREN AND FAMILIES, STOP CHILD PREDATORS, THE KLAASKIDS FOUNDATION, THE JESSICA MARIE LUNSFORD FOUNDATION, AND THE JOYFUL CHILD FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

The National Law Center for Children and Families ("National Law Center"), based in Alexandria, Virginia, is a non-profit legal organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws across the nation. Through its legal staff, resource library, and publications, the National Law Center actively participates in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop child pornography and its concomitant harms of sexual exploitation of children, women, and families. The National Law Center has participated in numerous *amici curiae* briefs in this Court, including *Osborne v. Ohio*, *Alexander v. United States*, and *Jacobson v. United States*.

Stop Child Predators is a non-profit organization based in Washington, D.C. and brings together law enforcement organizations, community groups, and victims' rights advocates to lead targeted public awareness campaigns to prevent crimes against children. Through outreach, education, and advocacy, Stop Child Predators is dedicated to advancing three goals in all 50 States: implementing mandatory sentencing minimums and tougher penalties for those guilty of crimes against children; promoting an efficient and integrated nationwide sex offender registry; and providing for victims' representation during both the sentencing of child predators and again prior to the offender's release into the community.

The KlaasKids Foundation is a non-profit corporation that was founded in September 1994. Its mission is to stop crimes

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[1] Pursuant to this Court's Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters to that effect have been lodged with the Clerk of the Court.

against children by focusing on three goals: increased awareness and education; partnerships among government, law enforcement, social-service and non-profit organizations, community organizations, and individuals; and criminal-justice legislative reform. To encourage these goals, the KlaasKids Foundation has created, researched, supported, and engaged in many programs and activities.

The Jessica Marie Lunsford Foundation ("Lunsford Foundation"), based in Homosassa Springs, Florida, is a section 501(c)(3) non-profit organization, dedicated to educating the community about the dangers created by sex offenders, protecting children in crisis, and promoting legal efforts to stop the pedophiles, sex offenders, and predators who prey on children across the nation. In conjunction with its goals, the Lunsford Foundation supports a wide variety of educational programs and child-fingerprint drives throughout the country.

The Joyful Child Foundation (in Memory of Samantha Runnion) is a non-profit public benefit corporation formed in 2002. The Foundation's programs focus on proactive approaches in dealing with the difficult issues of violence against children while celebrating the gift that is every child. Among the activities supported by the Foundation are community "child watch" programs, research concerning child predator and recidivism prevention, and programs that serve in the prevention of child abuse and/or abduction.[2]

SUMMARY OF ARGUMENT

The Court of Appeals wrongly invalidated an effective and constitutional tool for staunching the marketing and traffick-

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[2] *Amici* also note that their undersigned counsel of record previously served as an Associate Deputy Attorney General, and in that capacity had a substantial role in the process leading up to the enactment of the PROTECT Act. *See* note 3 *infra* (summarizing legislative hearings leading up to the Act).

ing of child pornography over the Internet. By criminalizing the unprotected act of *advertising or promoting* child pornography (as opposed to the actual possession or distribution itself), the PROTECT Act's "pandering" provision properly allows the Government to prosecute a would-be purveyor or consumer of child pornography without necessarily having to prove that that the defendant actually had or received any real child pornography. 18 U.S.C. § 2252A(a)(3)(B).

As Congress recognized, the availability of this narrowly drawn pandering charge is essential to ensuring that technological changes do not eviscerate the practical enforceability of the nation's child pornography laws. In enacting the PROTECT Act, Congress correctly found that the availability of "virtual" imaging technology and other techniques have allowed criminal defendants increasingly to argue, with some success, that there is a reasonable doubt as to whether the images they trafficked or possessed were virtual or real. Unfortunately, the available evidence since the PROTECT Act vindicates Congress's pessimism on this score: there is clear evidence that the virtual image defense is hindering the effective enforcement of child pornography laws by (1) allowing defendants to escape prosecution; (2) substantially increasing the time and resources that must be devoted to win a child pornography case, including time-consuming battles over expert testimony; and (3) distorting the mix of cases that are charged in favor of only those cases involving images of *identified* minors.

The Court of Appeals' rationale for invalidating this important statute rests on both statutory and constitutional error. The court acknowledged that the PROTECT Act's pandering provision avoids the specific constitutional problems of the predecessor provision invalidated in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), and the court likewise acknowledged that, if the provision reaches only commercial or unprotected speech, it is not facially invalid. Pet. App.

19a-22a. The court nonetheless held the provision impermissibly overbroad because (in the court's view) it was "not limited to commercial exploitation and continues to sweep in non-commercial speech." Pet. App. 22a. The statutory text makes clear, however, that the provision criminalizes only *speech that, as in this case, proposes a transaction in child pornography—i.e.*, offers or solicitations to purchase, trade, or otherwise distribute child pornography. Contrary to the lower court's suggestion, all of this expression constitutes either commercial or unprotected speech for purposes of the First Amendment, and the pandering provision therefore falls squarely within the Government's power to prohibit speech that proposes an illegal transaction or that is false and misleading.

ARGUMENT

Because the decision below threatens to undermine the Government's ability to address the persistent and serious threat posed by child pornography, and because it does so on the basis of a flawed statutory and constitutional analysis, this Court should reverse the judgment and uphold the validity of the PROTECT Act's "pandering" provision.

I. THE PROTECT ACT'S "PANDERING" PROVISION WAS CAREFULLY DRAWN TO TARGET UNPROTECTED "OFFERS TO TRANSACT" IN CHILD PORNOGRAPHY

As this Court recognized long ago, "[t]he most expeditious if not the only practical method of law enforcement" in fighting child pornography "may be to dry up the market for this material by imposing severe criminal penalties on persons selling, *advertising, or otherwise promoting* the product." *New York v. Ferber*, 458 U.S. 747, 760 (1982) (emphasis added). The child pornography "pandering" provision that was facially invalidated in this case, 18 U.S.C. § 2252A(a)(3)(B), was an outgrowth of Congress's effort to

do just that—to strike at the *hawking* of child pornography, as opposed to its actual possession or distribution (which are covered by other provisions of the criminal code).

In drafting this provision, Congress sought simultaneously to satisfy two important objectives. First, Congress endeavored to frame the statute in a way that would comply fully with the requirements of the First Amendment as construed by this Court in *Free Speech Coalition*. *See* S. REP. NO. 108-2, at 6 (2003) ("S. 151 has been carefully written to work within the limitations established by that decision."). Second, Congress sought to write the provision so that prosecutors would be able to establish unlawful pandering *without* having to undertake the potentially difficult task of proving whether the panderer could actually have delivered "real" child pornography (*i.e.*, pornography produced by using real children). *Id.* at 12; *see also* H.R. REP. NO. 107-526, at 22-23 (2002) (discussing predecessor bill).

The Eleventh Circuit concluded that Congress's twin objectives were incompatible, because in order to comply with the First Amendment, the "Government must do its job to determine whether illegal material is behind the pander." Pet. App. 35a. As we explain below, the Court of Appeals' erroneous conclusion rested on a misapprehension of both the meaning of § 2252A(a)(3)(B) and the relevant First Amendment principles. *See infra* at 18-30. But in order to understand fully why the lower court's statutory and constitutional analysis were so plainly mistaken, it is useful to review in some detail the practical considerations that motivated Congress to draft § 2252A(a)(3)(B) the way that it did. Far from trying to excuse the Government from "do[ing] its job," Congress sought to fashion new and constitutionally valid tools to address the growing threat presented by computer technology to the enforceability of the nation's child pornography laws.

A. Congress Properly Found that Recent Technological Advances Threaten to Impede the Practical Enforceability of Traditional Prohibitions of Child Pornography

For more than a decade, Congress has sought proactively to address the risk that advances in computer technology may make it harder, *as a practical matter*, to enforce prohibitions against child pornography. *See* PROTECT Act, Pub. L. No. 108-21, § 501, 117 Stat. 650, 676-78 (Apr. 30, 2003) (congressional findings), *reprinted at* Pet. App. 72a-76a; Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, Div. A, § 121, subsec. 1, 110 Stat. 3009-26, 3009-26 to 3009-27 (Sept. 30, 1996) (congressional findings). Congress's primary concern has been that, although a flat prohibition against the possession or distribution of child pornography is unquestionably constitutional, *see Osborne v. Ohio*, 495 U.S. 103, 110 (1990), technological developments could create practical enforcement problems that would substantially eviscerate the Government's ability to enforce these vital prohibitions, which protect real children from real abuse. PROTECT Act, § 501(2)-(3), (13)-(14), Pet. App. 72a, 75a-76a. In drafting the PROTECT Act, Congress explicitly articulated these concerns at some length in the form of detailed factual findings set forth in the statute itself. *Id.*, § 501, Pet. App. 72a-76a.[3]

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[3] These findings were based on extensive hearings that were held in both houses over the course of two different sessions of Congress. *Enhancing Child Protection Laws After the April 16, 2002 Supreme Court Decision, Ashcroft v. Free Speech Coalition: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. (May 1, 2002) ["May 1, 2002 House Hearing"], available at <http://judiciary.house.gov/media/pdfs/printers/107th/79366. pdf>; *Child Obscenity and Pornography Prevention Act of 2002 and the Sex Tourism Prohibition Improvement Act of 2002: Hearing on H.R. 4623 and H.R. 4477 Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 107th Cong. (May 9, 2002) ["May 9, 2002 House Hearing"], available at <http://judiciary.house.gov/

1. Congress's Findings in the PROTECT Act

With the rise of the Internet, the "vast majority" of the child pornography traded or possessed today consists of "images contained on computer hard drives, computer disks, and/or related media." PROTECT Act, § 501(6), Pet. App. 73a. It is currently "prohibitively expensive" to "computer generate realistic images of child pornography" and is likely to remain so "for the foreseeable future." *Id.*, § 501(11), Pet. App. 75a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11 (statement of Special Agent Michael J. Heimbach, Chief, Crimes Against Children Unit, F.B.I.). Accordingly, "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." PROTECT Act, § 501(7), Pet. App. 73a.

However, it is not "difficult or expensive to use readily available technology to disguise ... depictions of real children to make them unidentifiable or to make them appear computer-generated." *Id.*, § 501(11), Pet. App. 75a; *see also id.*, § 501(5), Pet. App. 73a (finding that such technology already exists); May 1, 2002 House Hearing, *supra*, at 18 (statement of Ernest E. Allen, President, National Center for Missing and Exploited Children ["NCMEC"]) ("We are already seeing perpetrators modify existing images to make them look more like 'virtual' images.").[4] Moreover, the "retransmission of

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media/pdfs/printers/107th/79526.pdf>; *Stopping Child Pornography: Protecting Our Children and the Constitution: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Oct. 2, 2002) ["Oct. 2, 2002 Senate Hearing"], available at <http://www.access.gpo.gov/congress/senate/pdf/107hrg/88680.pdf>; *Child Abduction Prevention Act and the Child Obscenity and Pornography Prevention Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. (Mar. 11, 2003) ["Mar. 11, 2003 House Hearing"], available at <http://judiciary.house.gov/media/pdfs/printers/108th/85642.pdf>.

[4] NCMEC vividly illustrated the point by presenting a photographic array of four children, only one of whom was real (the others were "virtual chil-

images" over the Internet "can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child." PROTECT Act, § 501(8), Pet. App. 74a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11. The expert's task is even harder if the image was created by being "scanned from a paper version into a digital format," because "proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it." PROTECT Act, § 501(8), Pet. App. 74a; *see also* May 1, 2002 House Hearing, *supra*, at 7, 11.

As a result of these technological issues, "many criminal defendants have suggested that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-generated." PROTECT Act, § 501(7), Pet. App. 73a. Such challenges "increased significantly" after this Court's decision in *Free Speech Coalition*, and "[s]ome of these defense efforts have already been successful." *Id.*, § 501(7), (10), Pet. App. 74a-75a.[5]

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dren"). May 1, 2002 House Hearing, *supra*, at 22-23, 39. (The array is reproduced as Appendix A to this brief.) The child on the lower left of the array is real; the child on the lower right is entirely virtual; and the remaining two depictions are "morphed" images created from pictures of real children. *See id.* at 22-23; *see also* Susan S. Kreston, *Defeating the Virtual Defense in Child Pornography Prosecutions*, 4 J. High. Tech. L. 49, 73-74 (2004) (describing the array in more detail). Confirming Congress's finding that the technology for creating virtual images was not yet cost-effective for pornographers, NCMEC has stated that it took their forensic imaging specialist 2½ days to create the virtual image, even though the image only shows the child from the shoulders up. *Id.* at 74.

[5] This latter finding was supported by testimony from the Department of Justice at the House hearing held in early 2003:

> In *Free Speech Coalition*, Justice Thomas' concurring opinion had noted that the Government had thus far been unable to point to any specific cases in which a "computer-generated images" defense had been successful. 122 S. Ct. at 1406. That is no longer the case. We have suffered several adverse judgments, including a partial directed

Congress also recognized that this problem was only going to get worse over time. *Id.*, § 501(13), Pet. App. 75a-76a. As technological advances continued, there would be an increasing threat that defendants would be able to "create a reasonable doubt in every case of computer images even when a real child was abused." *Id.* And even if the Government could show through expert forensic analysis that a particular image was not virtual, a defendant might still be able to create reasonable doubt as to *scienter* by claiming that *he* believed the images were virtual. *Id.*

Moreover, Congress recognized that the impact of this problem cannot be measured solely in terms of the number of cases in which defendants *successfully* assert a virtual child pornography defense. The increased drain on resources associated with rebutting such defenses (*e.g.*, through expert testimony or through case-specific investigation of the origin of the relevant images) exacts its own significant cost: "the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedi-

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verdict of acquittal, as a result of the assertion of such defenses in child pornography cases. *See, e.g., United States v. Sims*, 220 F. Supp. 2d 1222 (D.N.M. 2002) (after the decision in *Free Speech Coalition*, court entertained motion to reconsider previously denied motion for judgment of acquittal; judgment of acquittal was granted with respect to one set of images); *United States v. Bunnell*, 2002 WL 927765 (D. Me. 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted); *see also United States v. Reilly*, 01 Cr. 1114 (RPP), 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002) (after *Free Speech Coalition*, motion to withdraw guilty plea granted; court held that the Government must prove beyond a reasonable doubt that *the defendant knew* that the images depicted real children).

Mar. 11, 2003 House Hearing, *supra*, at 8-9 (statement of Daniel P. Collins, Assoc. Dep. Att'y Gen.); *see also* May 1, 2002 House Hearing, *supra*, at 22 (statement of Lt. William C. Walsh, Dallas Police Dep't) (noting example of a case in which the prosecution was dropped because "the prosecutor knew that he could not identify the children depicted as real individuals").

cated to each child pornography case now are significantly higher than ever before." *Id.*, § 501(10), Pet. App. 75a; *see also* Oct. 2, 2002 Senate Hearing, *supra*, at 32-37 (describing in detail the resource problems associated with disproving "virtual" pornography defenses).

In addition to the potential impact on the *number* of cases being filed, the ability to raise such defenses had already led to a discernible shift in the *mix* of cases that were being accepted for prosecution. Thus, Congress found that, after the Ninth Circuit's 1999 decision in *Free Speech Coalition* (which was affirmed by this Court in 2002), "prosecutions generally have been brought" in that Circuit "only in the most clear-cut cases in which the government *can specifically identify the origin of the image*"—which represents only "a fraction of meritorious child pornography cases." PROTECT Act, § 501(9), Pet. App. 74a (emphasis added); *see also* Mar. 11, 2003 House Hearing, *supra*, at 9; May 1, 2002 House Hearing, *supra*, at 10-11, 25.

2. Events Subsequent to the PROTECT Act Strongly Confirm Congress's Findings

Subsequent events have confirmed that all of the concerns identified by Congress in the PROTECT Act remain well-founded. The available data demonstrate that the virtual image defense is hindering the effective enforcement of the child pornography laws by (1) allowing defendants to escape prosecution; (2) substantially increasing the time and resources that must be devoted to win a child pornography case; and (3) distorting the mix of cases that are charged.

In particular, a study conducted by NCMEC and the Crimes Against Children Research Center at the University of New Hampshire surveyed state prosecutors across the country to assess the practical impact of the *Free Speech Coalition* decision. *See Child-Pornography Possessors Arrested in Internet-Related Crimes: Findings from the National Juvenile*

Online Victimization Study (2005), available at <http://www.missingkids.com/en_US/publications/NC144.pdf>. The study found that, within one year of the decision, 40% of state prosecutors reported that the virtual image defense had been raised in cases in their offices, and that nearly 10% of prosecutors reported declining cases they would have pursued before *Free Speech Coalition*. *Id.* at 22-23. Moreover, the study confirmed Congress's prediction that prosecutors would shift their mix of cases in favor of those involving identified victims: nearly *two-thirds* of all offices reported using victim-identification as a means of complying with the Court's decision. *Id.* at 23-24.

The reported cases confirm and illustrate these practical problems. For example, in an Ohio case, a defendant was partially successful in asserting a virtual image defense at trial, and (at least for now) *fully* successful in pressing the defense on appeal. *See State v. Tooley*, No. 2004-P-0064, 2005 WL 3476649 (Ohio App. Dec. 16, 2005), *appeal pending*, No. 2006-0216 (Ohio S. Ct.). At a bench trial, the State presented an agent who testified that the persons depicted in three of the charged images were real because the agent was able to cross-reference the images with the National Child Victim Identification System. 2005 WL 3476649 at *2, ¶ 8. The defendant, in turn, presented an expert who testified that "it would be impossible to determine, by the makeup of the image alone, whether a digital image had been altered or was entirely fake." *Id.*, ¶ 10. The court partially accepted the virtual image defense, because it convicted the defendant *only* on the counts involving the three images identified in the victim database and *acquitted* the defendant on the remaining counts. *Id.*, ¶ 11. On appeal, the Ohio Court of Appeals facially invalidated the statute, but also held, in the alternative, that the defendant was entitled to *a judgment of acquittal* on the remaining counts because the agent's testimony about the database identifications was inadmissible hearsay. *Id.* at *9-*12, ¶¶ 88-102; *see also* Oct. 2, 2002 Senate Hearing,

supra, at 34 (noting case in which, because of hearsay objections, Government had to produce victim-identification witnesses from Germany and the U.K.).[6]

The substantial costs, as well as the future risks, associated with the "virtual" child pornography defense are vividly illustrated by the recent 2-1 decision in *United States v. Rodriguez-Pacheco*, 475 F.2d 434 (1st Cir. 2007). In that case, the defendant raised the virtual image defense at *sentencing* in connection with the application of the guidelines enhancement for possessing 10 or more images. *Id.* at 437-38. In response, the Government presented the testimony of an F.B.I. expert who explained and applied a methodology for determining whether images were those of real children. *Id.* at 438. Subsequent review of the transcript revealed, however, that the expert had only testified as to nine images, and the district court filled the resulting gap by finding that the court could itself adopt and apply the expert's methodology to the tenth image. *Id.* On appeal, the majority held this to be sufficient, *id.* at 445-46, but Judge Torruella issued a lengthy dissent, *id.* at 446-64.

Judge Torruella relied heavily on the fact that the Government's own expert had conceded that it was technologically possible, with sufficient time, to "'create a perfect fake image.'" *Id.* at 453 (quoting expert's testimony). Because it was thus "beyond scientific dispute that it is possible to create virtual photographic images that can only be detected (with difficulty) by experts," Judge Torruella concluded that "experts are *required* before factfinders can make their findings on this issue." *Id.* at 464 (emphasis added). That the Govern-

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[6] In another Ohio case, the state court of appeals affirmed the dismissal of an indictment because the defendant's virtual-images expert (who happened to be the same expert who testified in *Tooley*) was rendered unavailable when the federal Government executed a search warrant on his residence. *See State v. Brady*, No. 2005-A-0085, 2005 WL 1113969 (Ohio App. Apr. 13, 2007).

ment went to the trouble of presenting the expert testimony in the first place—at sentencing, no less—is proof enough of the costs created by the virtual image defense; but if the dissenting judge's view of the technology (and the law) is adopted by other courts, the costs will be considerably higher.

Other cases amply confirm Congress's prediction that the increasing role of complex expert testimony in child pornography cases would become a source of protracted and expensive satellite litigation. For example, in one case pending in Massachusetts, a defendant raising a virtual image defense brought a successful motion to exclude the Government's contrary expert testimony as not satisfying the standards in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See United States v. Frabizio*, 445 F. Supp. 2d 152 (D. Mass. 2006), *reh'g granted in part*, 463 F. Supp. 2d 111 (D. Mass. 2006) (granting the Government another opportunity to try to establish admissibility). Notably, the opinion in *Frabizio* observed that the *Daubert* hearing lasted *three days*, and that the Government's first proffered expert was withdrawn after cross-examination revealed that his computer program for analyzing images had a potential error rate as high as 30%. *See* 445 F. Supp. 2d at 154 n.2.

Indeed, the use of the virtual image defense has become so widespread that Congress in 2006 enacted regulatory provisions designed to ensure that defense forensic experts in child pornography cases would generally be required to conduct their pretrial inspections and examinations at Government facilities. 18 U.S.C. § 3509(m). This, in turn, has created yet another layer of litigation as to the meaning and validity of these restrictions. *See, e.g., United States v. Kellinger*, 471 F. Supp. 2d 640 (E.D. Va. 2007); *United States v. O'Rourke*, 470 F. Supp. 2d 1049 (D. Ariz. 2007).

B. Congress Crafts a Narrow Provision Focused on "Offers to Transact in" Child Pornography

In light of these concerns, Congress sought to come up with constitutionally valid tools that would allow prosecutors to combat the market for child pornography without having to undertake the potentially difficult task of proving the origin of particular images. One approach was to aim at the *advertising or promotion* of child pornography, as opposed to its actual production and distribution. However, Congress's first effort at crafting such a law, 18 U.S.C. § 2256(8)(D) (2000 ed.) (since repealed), was facially invalidated by this Court in *Free Speech Coalition*. 535 U.S. at 257-58. As this Court's decision makes clear, the problem was that Congress had crossed wires in drafting the provision: rather than attacking the marketing directly, Congress instead proscribed the possession and distribution of *materials* depending upon how they were marketed. 535 U.S. at 257. As the Court explained:

> "Materials falling within the proscription are tainted and unlawful in the hands of all who receive it, though they bear no responsibility for how it was marketed, sold, or described.... [*The statute*] *prohibits possession of material described, or pandered, as child pornography by someone earlier in the distribution chain.* The provision prohibits a sexually explicit film containing no youthful actors, just because it is placed in a box suggesting a prohibited movie. *Possession is a crime even when the possessor knows the movie was mislabeled.* The First Amendment requires a more precise restriction. For this reason, § 2256(8)(D) is substantially overbroad and in violation of the First Amendment."

Id. (emphasis added).

In response to *Free Speech Coalition*, Congress held extensive hearings in both the 107th and the 108th Congress as to

how it might fix the problems this Court had identified. *See* note 3 *supra*. The House and Senate bills that were the subject of these hearings all contained substantially similar language that sought to amend the "pandering" prohibition in a way that would address the constitutional concerns identified in *Free Speech Coalition* by focusing directly on the *marketing* of child pornography.[7]

As first introduced, the House version would have added a new section creating the related offenses of "pandering" and "solicitation" of child pornography. *See* H.R. 4623, 107th Congress (2002). The "pandering" provision focused on the marketing of child pornography by making it a crime to

> "offer[], agree[], attempt[], or conspire[] to provide or sell a visual depiction to another, and ... in connection therewith knowingly [to] advertise[], promote[], present[], or describe[] the visual depiction with the intent to cause any person to believe that the material is, or contains, a visual depiction of a minor engaging in sexually explicit conduct."

Id., § 3 (proposing a new 18 U.S.C. § 2252B(a)).[8] The Department of Justice argued in its testimony that, by "regulating the marketing itself," this provision should avoid "con-

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[7] Much of the debate over the PROTECT Act focused on a separate set of provisions under which Congress proscribed (subject to an affirmative defense) a very narrow class of digital or computer images that were visually "indistinguishable" from hard-core child pornography. 18 U.S.C. § 2256(8)(B); *see also id.*, §§ 2252A(c), 2256(2)(B), 2256(11). These latter provisions were intended to address this Court's invalidation of the more broadly worded prohibition on "virtual" child pornography that had been contained in prior law. *Free Speech Coalition*, 535 U.S. at 244-56. No issue concerning these provisions of the PROTECT Act is before the Court in this case.

[8] A separate subsection of the House bill would have created an analogous offense of soliciting child pornography. H.R. 4623, *supra*, § 3 (proposing a new 18 U.S.C. § 2252B(b)).

stitutional difficulty":

> "There is no constitutional limitation on the ability of the legislature to establish inchoate offenses (attempt, conspiracy, solicitation, etc.) respecting conduct that is aimed at unlawful transactions. For example, offering to provide or sell illegal drugs can be criminalized, even where the offeror does not actually have such drugs in hand."

Oct. 2, 2002 Senate Hearing, *supra*, at 109-10.

As reported by the Judiciary Committee, the Senate version of the "pandering" provision likewise targeted the marketing directly by making it a crime "knowingly—... [to] *advertise[], promote[], present[], distribute[]*, or solicit[]... any material or purported material in a manner that conveys the impression that the material or purported material is, or contains, an obscene visual depiction of a minor engaging in sexually explicit conduct." S. 2520, 107th Cong., § 3 (as reported by S. Comm. on the Judiciary, Nov. 14, 2002) (emphasis added).[9]

At the Senate hearing on this legislation, the concern was raised that the deliberate elimination of any requirement to prove that the defendant *actually* had child pornography might render the pandering provision unconstitutional. *See* Oct. 2, 2002 Senate Hearing, *supra*, at 152 (testimony of Prof. Schauer). Professor Schauer acknowledged, however, that

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[9] The Senate version, however, would have required that the material or purported material be advertised as *both* obscenity and child pornography. The feature was eliminated when the Senate Judiciary Committee reexamined the matter at the start of the 108th Congress. *See infra* at 17-18. Moreover, as originally introduced in the 107th Congress, the Senate version would have added "describes" to the italicized list of verbs shown above, but that language was eliminated in the Judiciary Committee after the Justice Department objected that it would extend beyond marketing and would thereby render the provision unconstitutional. *See* Oct. 2, 2002 Senate Hearing, *supra*, at 110.

"[i]t is possible that advertising for an unlawful product when the product does not in fact exist is also outside of the protection of commercial advertising ...." *Id.* at 152 n.3. Picking up on this latter point, the Justice Department explained at length why it would be constitutional to prohibit "all offers to provide materials that are intentionally *advertised* in a manner designed to cause recipients to believe that the material is child pornography":

> "If the materials are, in fact, child pornography, then the offer may unquestionably be proscribed (as Professor Schauer admits). On the other hand, if the materials were not child pornography, but had been advertised intentionally as if they were, then the offeror is, in effect, engaged in a species of false advertising.... There is little doubt that such false advertising purporting to offer an illegal product is not constitutionally protected. Thus, *because the First Amendment allows the prohibition of both truthful advertising of an illegal product and false advertising of any product, it cannot be unconstitutional to prohibit all advertising that offers an illegal product*, regardless of whether the purveyor can actually make good on the promise...."

Id. at 31 (emphasis added).

The differences between the competing House and Senate versions were not resolved before the end of the 107th Congress, but both houses moved promptly to pass legislation at the beginning of the 108th Congress. In adopting the prohibition on "pandering" that became 18 U.S.C. § 2252A(a)(3)(B), the Senate Judiciary Committee reaffirmed that the pandering offense did *not* require proof that the materials offered or solicited actually existed:

> "The crux of what this provision bans is *the offer to transact in this unprotected material, coupled with proof of the offender's specific intent.* Thus, for example, this provision prohibits an individual from offering to dis-

> tribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography. The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material."

S. REP. NO. 108-2, at 12 (2003). The House-Senate Conference Committee subsequently adopted the Senate version. H.R. REP. NO. 108-66, at 61 (2003).

II. BECAUSE THE PANDERING PROVISION REACHES ONLY COMMERCIAL OR UNPROTECTED SPEECH, THE COURT OF APPEALS ERRED IN FACIALLY INVALIDATING THE PROVISION

Notably, the Court of Appeals explicitly agreed with the underlying premise on which Congress had concluded that the pandering provision would be constitutional: "the government may prohibit completely the advertisement or solicitation of an illegal product or activity as well as false or misleading advertisement because neither is protected speech." Pet. App. 20a; *accord Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976). Thus, if a person offers or solicits actual child pornography, he has proposed an illegal transaction "that the government may constitutionally proscribe." Pet. App. 20a. Conversely, if a person offers or solicits child pornography under false pretenses, he has "engaged in false or misleading advertising, which the government may likewise punish." *Ibid.* Similarly, the Court of Appeal recognized that, if the pandering provision reached only commercial or unprotected speech, the "strict overbreadth" doctrine was inapplicable. *Ibid.* (citing

Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 481 (1989)).

Nonetheless, the Court of Appeals facially invalidated the provision, because it concluded that the statute extends to "*non-commercial* promotion, presentation, distribution, and solicitation." Pet. App. 22a (emphasis added). In reaching this conclusion, the lower court plainly misconstrued both the reach of the provision and the commercial speech doctrine. Properly construed, the pandering provision extends only to offers to transact in child pornography: speech that proposes a sale or purchase of child pornography images, an exchange or trade of such images, or the distribution of such images free of charge. Because such speech by definition either proposes an illegal transaction or constitutes a fraudulent offer to transact, the scope of the pandering provision is precisely coextensive with the government's power to ban commercial or unprotected speech.

A. The Pandering Provision Criminalizes Only Offers or Solicitations to Transact in Child Pornography

The PROTECT Act provides that a person commits a crime if he or she "knowingly ... advertises, promotes, presents, distributes, or solicits" any material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material is either actual child pornography or obscene virtual child pornography. 18 U.S.C. § 2252A(a)(3)(B). Under the plain meaning of this provision, a defendant is guilty of pandering only if he intentionally offers to provide or solicits material that is or purports to be child pornography.

Each of the verbs used by Congress to define the prohibited activities denotes an affirmative effort either to furnish child pornography to other people or to obtain it from them. To "advertise[]" means to "issue a public statement ... of something offered or wanted," WEBSTER'S THIRD NEW

INTERNATIONAL DICTIONARY 31 (1968), and to "promote[]" means "to present (merchandise) for public acceptance through advertising or publicity," *id.* at 1815. Someone "presents" something when he or she "lay[s] or put[s] [it] before a person for acceptance," *id.* at 1793, and "distributes" it by "giv[ing] out or deliver[ing]" it, particularly "to the members of a group," *id.* at 550. The verb "solicits" also connotes active effort; it means "to endeavor to obtain by asking or pleading." *Id.* at 2169.

By requiring that these actions be taken "in a manner that" reflects or intentionally induces the belief that the subject material is real child pornography, Congress made clear that the offer or solicitation must objectively indicate the (illegal) nature of what is being offered or sought. And the use of the modifier "knowingly" ensures that criminal liability will be limited to defendants who act with scienter—*viz.*, knowing that their actions would reasonably be understood as offers or requests for child pornography or obscenity. *Cf. United States v. X-Citement Video*, 513 U.S. 64, 78 (1994) (construing the word "knowingly" in a statute prohibiting the interstate transportation of sexually explicit depictions of minors to modify not just the "surrounding verbs," but also the age elements criminalizing the materials).

The legislative history of the PROTECT Act confirms what is apparent from the statutory text: the pandering provision requires an intentional offer to furnish, or request to obtain, actual child pornography. As Congress explained, "[t]his provision bans the offer to *transact* in unprotected materials, coupled with proof of the offeror's specific intent." H.R. REP. NO. 108-66, *supra*, at 61 (emphasis added); *see also* S. REP. NO. 108-2, *supra*, at 12 ("[t]he crux of what this provision bans is the offer to transact in unprotected material"). In focusing on the pandering activity itself, Congress consciously departed from the approach of the provision invalidated in *Free Speech Coalition*, which had criminalized the

mere possession of materials pandered as child pornography. H.R. REP. NO. 108-66, *supra*, at 22. Instead, Congress sought to prevent anyone from "offering to distribute anything that he specifically intends to cause a recipient to believe to be actual or obscene child pornography," or "from soliciting what he believes to be" such materials. S. REP. NO. 108-2, *supra*, at 12.

When the statutory text and Congress's express intent are given effect, it is clear that the pandering provision is limited to speech that specifically *proposes a distribution of child pornography*, regardless of whether consideration is sought in exchange (and regardless of the form of any such consideration). Thus, by its terms, the statute would apply to anyone who solicits child pornography for purchase or who advertises such images for sale. It would apply to anyone who, like the defendant in this case, offered to trade child pornography images. And it would apply to anyone who offered to furnish child pornography images for free. But it would *not* apply to speech that is unconnected to an offer to distribute child pornography.

B. The Expression Prohibited by the Pandering Provision is Unprotected Commercial Speech

1. Offers to Transact in Materials or Services Are Commercial for Purposes of the First Amendment Regardless of Whether Any Consideration Is Paid

This Court's cases make clear that, at a minimum, the commercial speech doctrine embraces speech "proposing a commercial transaction." *Virginia Bd. of Pharmacy*, 425 U.S. at 762; *cf. Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (noting that commercial speech may more broadly include "'expression related solely to the economic interest of its speaker and audience'") (citation omitted). There can be no question that offers for the purchase or sale of child por-

nography propose a form of commercial transaction, and thus constitute (unprotected) commercial speech. Pet. App. 20a. Similarly, as discussed below, *see infra* at 24-26, any offer to trade or exchange child pornography is, contrary to the Court of Appeals' view, also a form of (unprotected) commercial speech. But even requests or offers to furnish child pornography *without* any consideration fall within the scope of the commercial speech doctrine (and, again, are unprotected).

The commercial speech doctrine has never been restricted to speech proposing the purchase or sale of goods for cash, nor has it been defined in terms of the consideration supporting the proposed transaction. The scope of the doctrine turns, instead, on the reasons for according commercial speech less protection: its close relationship to *transactions* that the government may regulate. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1992) (noting that commercial speech is "'linked inextricably' with the commercial arrangement that it proposes, so the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself") (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)); *accord 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 499 (1996) (plurality) ("the State's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech"). It is because the government has the authority to proscribe fraud and to ban certain goods, then, that it has greater leeway to regulate "the commercial aspects" of speech involving such goods. *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96 (1976).

The government's traditional interests in regulating commercial speech apply whether or not a proposed transaction for goods or services is supported by consideration. An offer to give away commodities or services free of charge "occurs in an area traditionally subject to government regulation" no less than speech proposing a sale, purchase, or trade. *Cf. Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

The Court has left "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes," *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), and the same principle logically extends to advertisements offering to give away contraband. Similarly, the government's long-recognized interest in protecting consumers from fraudulent or unlawful transactions, *Virginia Bd. of Pharmacy*, 425 U.S. at 771-72, attaches regardless of whether the speaker is offering the materials or services free of charge.

What is critical, for First Amendment purposes, is that the speech serves an "informational purpose" in the marketplace, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980), with the speaker offering to provide such goods or services, or soliciting them from others. In this respect, speech that proposes the distribution of a free product or service bears many of the characteristics distinguishing commercial speech "from speech at the First Amendment's core." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1994). A person who offers to give away a commodity or to provide a service for free announces the availability of a good to people in the marketplace. *Cf. Virginia Bd. of Pharmacy*, 425 U.S. at 748 (advertising is the "dissemination of information as to who is producing and selling what product, for what reason, and at what price"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66-67 (1982) (including "the reference to a specific product" among factors that collectively indicated the claimant's speech was commercial). Whether or not he or she expects something in return, a party who proposes a distribution of goods is an "offeror[] communicating offers to offerees," *Linmark*, 431 U.S. at 96, and is engaged in "transaction-driven speech," *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 496 (1995) (Stevens, J., concurring). One could hardly argue, for example, that because the use of internet search engines is free to

consumers, the companies providing such services have a right to lie about their features.[10]

2. The Court of Appeals Improperly Treated Offers to Trade and Exchange Materials as Noncommercial

The Court of Appeals also assumed that offers to *exchange and trade* child pornography do not amount to commercial speech, asserting that "most child pornography is discussed and exchanged in a *non-commercial* setting." Pet. App. 34a (emphasis added). The court provided no support for this startling assertion, which is both factually and legally erroneous. It is factually wrong because there is plenty of evidence that a significant volume of child pornography is sold for cash over the Internet. *See, e.g.*, May 1, 2002 House Hearing, *supra*, at 20-22. Indeed, Congress recently expressly found that the advent of the Internet has had "the unfortunate result of greatly increasing the interstate market in child pornography," and that this market was composed of a for-profit industry and a network of private parties exchanging child por-

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[10] Even if they did not constitute (unprotected) commercial speech, offers or solicitations of free contraband would still be unworthy of overbreadth's "strong medicine." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Because someone offering to give away contraband can "determine more readily than others whether his speech is truthful and protected," the overbreadth doctrine "is not necessary to further its intended objectives" of avoiding "uncertainty" and chill. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977). The marginal First Amendment protection afforded by the doctrine here does not outweigh the "substantial social costs" of facially invalidating a law that reflects "legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (quoting *Broadrick*, 413 U.S. at 615). This is especially so because speech proposing the free distribution of contraband directly implicates the state's interests in suppressing the banned material and in preventing fraud.

nography. *See* Pub. L. 109-248, 501, 120 Stat. 587, 623 (2006). As Congress explained:

> "A substantial interstate market in child pornography exists, including not only a multimillion dollar industry, but also a nationwide network of individuals openly advertising their desire to exploit children and to traffic in child pornography. Many of these individuals distribute child pornography with the expectation of receiving child pornography in return."

Ibid.

In addition to being factually an oxymoron, the Court of Appeals' concept of "non-commercial" child-pornography exchange is *legally* erroneous. The constitutional commercial speech doctrine does not even require that the underlying transaction be supported by *any* consideration, *see supra* at 21-24, and, in addition, this Court has long recognized that barter and exchange *are* core commercial activities. *See, e.g., Welton v. Missouri*, 91 U.S. 275, 280 (1875) (noting that, for purposes of the Commerce Clause, the term commerce includes "the transportation, purchase, sale, and *exchange* of commodities") (emphasis added); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895) (observing that Congress's Commerce Clause power clearly extends to "[c]ontracts to buy, sell, or exchange goods to be transported among the several states"); *Gibbons v. Ogden*, 9 U.S. (Wheat.) 1, 229 (1824) (Johnston, J., concurring) ("commerce, in its simplest signification, means an exchange of goods..."); *cf. also United States v. Brown*, 333 F.3d 850, 853 (7th Cir. 2003) (explaining that "pecuniary gain is a broad concept itself and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration"); *accord United States v. Laney*, 189 F.3d 954, 958-61 (9th Cir. 1999). And in the Internet age, which has vastly facilitated barter in child pornography, the Court of Appeals' suggestion that speech proposing such barter is "non-commercial" is quite untenable.

See United States v. Richardson, 238 F.3d 837, 842 (7th Cir. 2002) (Posner, C.J.) ("Use of the Internet enhances the dangers that child pornography poses, because it is a more discreet and efficient method of distribution ..."); S. REP. NO. 108-2, *supra*, at 4 (noting that child pornography images "increasingly are appearing on a computer or digital image that is sold, *traded*, *bartered*, *exchanged*, or simply downloaded over the internet") (emphasis added); H.R. REP. NO. 107-526, *supra*, at 12 (noting that pedophiles "also like to trade these pictures with other pedophiles to validate their actions" and that there are "those who sell it for a profit").

C. The Court of Appeals Erred in Holding that the Pandering Provision Reached Fully Protected Speech

When, as in this case, a statute is susceptible of a constitutionally sound construction, it is manifestly improper for a reviewing court to adopt an interpretation that "would create the necessity" for deciding a constitutional question. *Speiser v. Randall*, 357 U.S. 513, 523 (1958); *see also United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 355, 408 (1909). That, however, is precisely what the Eleventh Circuit did in the opinion below. The court invoked the overbreadth doctrine on the theory that the pandering provision "sweep[s] in non-commercial speech" and "fully protected" expression. Pet. App. 22a-23a. As explained above, this conclusion rests not only on the Court's crabbed understanding of the commercial speech doctrine, but also on its erroneously expansive interpretation of the pandering provision.

The Court of Appeals expressed concern that the pandering provision might "criminalize[] talking dirty over the Internet or telephone," Pet. App. 22-23a (citation omitted), and might impermissibly proscribe "the description or advocacy of illegal acts," *id.* at 23a. But the statutory text requires more than a generalized discussion about, or advocacy of, child pornog-

raphy; as noted above, *see supra* at 19-21, it imposes criminal liability only if the defendant intentionally *offers* or *solicits* actual child pornography. Someone who merely referenced child pornography as part of a lewd discussion or extolled its purported value would not be pandering it in the specific way required by the statute.

Because the verbs used by Congress have clear meanings, the Court of Appeals was obligated to "'enforce [the pandering provision] according to its terms.'" *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. __, 126 S. Ct. 2455, 2459 (2006) (citation omitted). By ignoring the statutory text, the Court improperly expanded the provision's intended scope. Indeed, far from prohibiting the mere "description" of child pornography, Pet. App. 23a, Congress struck language in an earlier version of the PROTECT Act that would have treated as pandering the act of "describing" material as child pornography. *See* note 9 *supra*.

The Court of Appeals held that the pandering provision could capture ambiguously worded speech about photographs and images, because the court concluded that the element requiring the defendant to act "in a manner that reflects the belief" that the material is child pornography "has no intent requirement." Pet. App. 40a. That is wrong. The most natural reading of the phrase is that the defendant must *have* the belief that his or her actions reflect. Moreover, the text and structure of the provision make clear that the "manner" of pandering prohibited by the statute is modified by the adverb "knowingly." That word is set forth in paragraph (a)(3), which modifies the entire clause describing the *actus reus*, *i.e.*, subparagraph (a)(3)(B). Under fundamental rules of grammar and statutory construction, "knowingly" must be read to modify not just the verbs in subparagraph (a)(3)(B), but also the phrase "in a manner that reflects ...." *See X-Citement Video*, 513 U.S. at 72 ("the presumption in favor of a scienter requirement should apply to each of the statutory

elements that criminalize otherwise innocent conduct"). Indeed, this Court in *X-Citement Video* interpreted "knowingly" to modify language defining criminal conduct even when it did not result in "[t]he most natural grammatical reading." *Id.* at 68.[11]

Finally, the Court of Appeals erred in concluding that the pandering provision would impinge upon "[f]reedom of the mind" by criminalizing a defendant's private view that "legal materials" were child pornography. Pet. App. 26a. To be liable under the provision, a defendant must do more than express his subjective views about an image; he must objectively offer it as actual child pornography, and must do so knowing that his speech carries this implication. As the District Court explained, the defendant must intentionally "create[] the context which would cause others to believe" the material is child pornography. Pet. App. 65a.[12]

III. EVEN IF THE PANDERING PROVISION COULD REACH SOME PROTECTED SPEECH, IT IS NOT SUBSTANTIALLY OVERBROAD

Even if the pandering provision reached some fully protected speech, it would not be facially invalid unless it is *substantially* overbroad, "not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 539 U.S. at 120. To invoke the overbreadth doctrine, Respondent had the burden to demonstrate, "'from the text of [the statute] and from actual fact,'" that substantial

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[11] Thus, even assuming *arguendo* the lower court's dubious assumption that an email describing an attached file as "little Janie in the bathtub" or "Good pics of kids in bed" (Pet. App. 40a) otherwise satisfied the elements of the statute, a "proud and computer-savvy grandparent" (*ibid.*) would obviously lack the requisite intent to pander.

[12] For substantially the same reasons, the court below plainly erred in holding that § 2252A(a)(3)(b) was void for vagueness. Pet. App. 37a-42a.

overbreadth exists. *Id.* (citation omitted). This he has not done and cannot do.

The statute's text makes clear that the overwhelming proportion of its applications will be constitutional. As even the Court of Appeals acknowledged (Pet. App. 20a), the First Amendment does not preclude convictions under the pandering provision for "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" child pornography in a commercial setting. The statute may therefore apply, consistent with the First Amendment, to any proposed purchase or sale of child pornography, whether it takes place on a website, through the mail, or in any other channel of interstate commerce. And because offers to exchange or trade child pornography clearly constitute (unprotected) commercial speech, *see supra* at 24-26, any such offer may also be punished under the provision without raising First Amendment concerns. The provision would properly apply to requests to exchange child pornography that are made by email, in an online chatroom, or in website postings.

Even assuming the statute would actually apply in the far-fetched scenarios posited by the Court of Appeals, Respondent failed to show—and the Court of Appeals failed to determine—that any such applications were either realistic or likely to occur in a substantial number of cases. As this Court has explained, a reviewing Court may not hold a statute overbroad merely because it "can conceive of *some* impermissible application of a statute." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (emphasis added). This principle applies with particular force here, because the Court of Appeals' hypothetical cases were, at best, the kind of "marginal applications" that cannot justify facial invalidation. *Parker v. Levy*, 417 U.S. 733, 760 (1974). Pandering prosecutions centering on photographs of "the family Rottweiler" are likely to be rare indeed, as are prosecutions based on innocuously labeled images of "toddlers in

footie pajamas." Pet App. 40a. A finding of overbreadth requires much more than the cobbling together of a few strained hypotheticals.

The Court of Appeals also failed to engage in a comparative assessment of such "problematic" applications in relation to the wide range of cases in which the provision can be constitutionally applied. The error is fatal, for this Court has made clear that a statute is not overbroad "unless it reaches a substantial amount of impermissible applications." *Ferber*, 458 U.S. at 771. Similarly, even if gratuitous offers of child pornography were fully protected speech—and they are not—there is nothing in the record to suggest that prosecutions of such offers would be substantial compared to other applications. To the contrary, Congress's findings on the growth of the interstate market for child pornography suggest that the overwhelming number of participants either trade child pornography or purchase it. *See supra* at 24-25.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A



[Photo array from May 1, 2002 House Hearing, *supra*, at 39.]

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No. 06-694

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is, and has been since its formation 25 years ago, a fierce defender of the right of free expression. Our mission is to provide free legal representation for those whose First Amendment free speech rights have been infringed, and we do this regardless of the nature of the speech or ideas expressed. The Institute is a staunch believer in the free marketplace of ideas concept—that where all ideas are given the opportunity for expression, the best ones will ultimately flourish.

The First Amendment guarantees all individuals the right to express their thoughts and ideas, whether those thoughts and ideas are lofty and noble, unconventional and distasteful, or just plain silly. However, the First Amendment does not protect speech that constitutes child pornography or that panders it. The Rutherford Institute recognizes the government's legitimate need to restrict certain types of expression that have been deemed by this Court to be so harmful, so utterly without redeeming social value, that they simply cannot be considered to exist on the same plane as other speech.

By upholding the PROTECT Act, this Court can allow the government to protect our nation's children by properly addressing the growing social evil of online child pornography. Because the PROTECT Act does not transgress the boundary between unprotected and protected speech, the Court can allow the government to use this tool without interfering with the universe of individual liberties secured by the First Amendment.

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[1] Counsel of record to the parties in this case has consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

Child pornography is a malignant cancer that has metastasized to the channels of everyday communication through the Internet. In passing the PROTECT Act, Congress put forth its best effort to equip law enforcement with the requisite tools to address this burgeoning blight. Careful to precisely define the type of expression that may be proscribed according to this Court's prior constitutional adjudications, Congress included the so-called "pandering provision" to allow law enforcement to target those who propose to exchange child pornography, whether commercially or socially. Respondent Williams would have this Court declare the PROTECT Act's pandering provision facially invalid due to the alleged defects of overbreadth and vagueness.

Amicus is no friend of censorship or suppression. In fact, the mission of The Rutherford Institute is to eliminate First Amendment threats wherever they exist. However, the First Amendment provides no solace for the type of expression at issue in this case. The First Amendment's guarantee of free speech was not intended to protect the pandering of material as fundamentally valueless as child pornography. Moreover, the government's compelling interest in ridding society of this cancer easily outweighs any veneer of worth that expressions lying on the fringe of the statute's scope might claim. In short, while The Rutherford Institute is a staunch defender of the First Amendment's guarantees, the Institute recognizes that some expression—such as that at issue here—is so utterly lacking in value that it is simply not entitled to claim the bulwark of protection offered by the First Amendment.

Finally, the Eleventh Circuit's holding that the statute is unconstitutionally overbroad and vague either

misinterprets or misapplies the language of the statute. To the extent that the Eleventh Circuit's hypothetical examples raise valid concerns about the potential scope of the statute, said concerns are adequately resolved by the fact that only individuals who possess specific intent to propose the exchange of the covered materials fall under its prohibitions. Moreover, since the speech targeted by the PROTECT Act—pandering of illegal child pornography—is clearly commercial in nature, the Eleventh Circuit's conclusion that noncommercial speech may be unconstitutionally reached is fatally flawed.

ARGUMENT

I. The First Amendment Does Not Protect the Communications in Question From Government Regulation.

Respondent's position, now embodied in the Eleventh Circuit's holding in this case, is that the PROTECT Act's pandering provision is unconstitutionally overbroad and vague because there is a possibility that it might be applied to non-commercial offers to exchange material that is either non-existent or does not, in fact, constitute illegal child pornography. See App. 22a-23a. This concern must always be discussed in light of the fact that said offers would only be covered by the statute when the party either believes that the material is child pornography or intends that the other party believe that it is such.

In this context, *amicus* submits that the expression in question simply does not fall within the ambit of the First Amendment. Moreover, even if the First Amendment did provide some minute level of protection for this expression,

the government's compelling interest in ridding the Internet of child pornography clearly overrides the speaker's "interest" in communicating these "messages."

"The protections afforded by the First Amendment ... are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 358 (2003). In determining which narrow classes of speech may be proscribed without offending the letter or spirit of the First Amendment, the Court has balanced the intrinsic value of the speech in question against society's interest in order and morality. (For a concise analysis of the rationale used by the Court in finding that the First Amendment permits certain categories of speech to be proscribed, see Norman T. Deutsch, "Professor Nimmer Meets Professor Schauer (and Others): An Analysis of 'Definitional Balancing' as a Methodology for Determining the 'Visible Boundaries of the First Amendment,'" 39 Akron L. Rev. 483, 500-528 (2006)). As the Court stated in 1942,

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such

> utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940)) (internal citations omitted).

Categories of expression that fall under these narrow categories of proscribable speech include obscenity, defamation, incitement, fighting words, true threats, speech that provokes a hostile audience, advocacy of illegal action, deceptive commercial speech, speech that invades privacy, and, of course, child pornography.

Amicus respectfully submits that the expression upon which the Court is now focused, that which is not itself child pornography but which panders it in the manner described by the PROTECT Act, can and should be proscribed according to the rationale used in creating these other categories of non-protected speech. The rationale behind three of the categories, in particular, applies with equal or more force to the type of expression in question here.

A. The Communications in Question are Proscribable for the Same Reason that Obscenity is Proscribable.

While the pandering of purported child pornography does not itself qualify as obscenity, the pandering expression covered by the statute is utterly without redeeming social value. Regardless of whether the underlying material actually qualifies as child pornography, and even regardless of whether or not any underlying material actually exists, there is simply no value whatsoever in speech that is intended to promote child pornography.

As Chief Justice Burger stated, "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." *Amicus* respectfully submits that the "grand conception of the First Amendment and its high purposes" would be equally demeaned by allowing the pandering of child pornography (or purported child pornography) to take refuge under them.

B. The Communications in Question are Proscribable for the Same Reasons that Incitement and Threats are Proscribable.

The rationale behind the Court's creation of the non-protected speech categories of incitement and threats applies to the expression that is the heart of the Eleventh Circuit's concern in this case. In ruling that speech falling within these categories may be proscribed, the Court has focused on the likely effects of the communication. Speech may be

prohibited as incitement where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Virginia v. Black*, 538 U.S. 343, 359 (2003) (*quoting Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)). The justification for prohibiting threatening speech focuses on the effect that such speech has on the receiver of the communication. The typical effect of a threat is the response of fear in the recipient. This Court has specifically noted that the speaker need not even intend to actually carry out the threat since the prohibition of threats is meant to protect individuals from the *fear* of violence, which would be the likely response on the part of the receiver. *Id.* at 359-60.

With these two types of expression, the value of the communications themselves is negligible, if existent at all, and the harm likely to be caused by their very utterance is great. Thus, the Court has determined that these communications are not entitled to First Amendment protection.

The communications that fall within the scope of the PROTECT Act's pandering provision effectively amount to incitement. Where the panderer of illegal child pornography has the requisite intent to exchange the illicit material, it is overwhelmingly likely that he or she will succeed in making such an exchange. Illegal activity, then, is the probable result of the pandering prohibited by the statute.

Using the Eleventh Circuit's hypothetical example, if a promoter offers to trade his video of "Our Gang" with an online pal "in a manner" either "that reflects the belief" or "that is intended to cause another to believe" that the material contains illegal child pornography, it is overwhelmingly likely that the online pal will respond in kind with materials that he or she believes to be illegal child pornography. This would be the probable effect even where

the promoter actually has no material to exchange. In fact, in that situation, it seems that his only motivation for claiming to have illegal child pornography would be to elicit child pornography from the receiver of his communication. Moreover, it is overwhelmingly likely that the person who promotes "Our Gang" as illegal child pornography and believes it to be just that has other, more sinister volumes in his collection that he will soon be sharing as well.

The Eleventh Circuit's opinion indicates that it did not even seriously consider the possibility that communications that fall within the scope of the pandering provision might constitute incitement. *Amicus* respectfully submits that, by operation of the same rationale applied to incitement, the pandering of child pornography should be considered non-protected speech under the First Amendment.

As with incitement, the Court's rationale for allowing threatening speech to be proscribed focuses on its undesirable effect. With threats, however, the primary probable effect to be avoided is fear on the part of the receiver, as well as "the disruption that fear engenders." *See Virginia v. Black*, 538 U.S. at 360. This rationale applies with equal force to the pandering of child pornography that falls within the scope of the PROTECT Act. The Eleventh Circuit's opinion in this case appears to overlook the interests of potential unwilling recipients of the pandering communications. These potential unwilling recipients have a right to be free from the fear and disruption that would be caused by receiving an e-mail or other message advertising, promoting, presenting, distributing, or soliciting illegal child pornography.

Imagine, for instance, that a mother of two young children is the recipient of such an unsolicited communication. In addition to the disgust and mental

anguish she would undoubtedly experience upon receiving the offer, she would very likely experience a legitimate fear of potential legal prosecution for being somehow involved in the seedy operation. Her suffering will be the same whether what the sender of the communication actually has is "a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." See App. 23a.

Because threats are proscribable on the basis of their effect on the audience, they may be proscribed regardless of whether or not the speaker is capable of carrying them out or intends to do so. *See Virginia v. Black*, at 360. Likewise, *amicus* respectfully submits that this Court should hold that the type of communication that falls within the PROTECT Act's pandering provision may be proscribed even where the communicator cannot, or does not, intend to actually exchange illegal child pornography.

C. The Communications in Question are Proscribable for the Same Reason that Defamation is Proscribable.

The Court has held that the First Amendment does not protect the category of speech known as defamation. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). This is because defamatory speech is at once untrue and harmful to others, and, as such, it does not contain sufficient value to outweigh the government's interest in proscribing it. According to this same rationale, *amicus* respectfully submits that where an individual falls within the scope of the PROTECT Act's pandering provision, but does not actually possess any illegal child pornography, his communication may be proscribed according to the rationale underlying the Court's defamation jurisprudence.

One of the primary reasons for the Eleventh Circuit's holding that the PROTECT Act's pandering provision is unconstitutionally overbroad was its concern that the provision could, in some instances, be used in prosecuting an individual who falsely claimed to possess illegal child pornography. *Amicus* respectfully submits that the Eleventh Circuit's concern for the protection of liars who would engage in this raunchy discourse is misplaced.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Gertz v. Robert Welch*, 418 U.S. 323, 339-40 (1974) (internal citations omitted).

While the government may have no legitimate interest in punishing the casual lie, false offers to exchange illegal child pornography, perhaps even to a greater extent than many defamatory statements, are extremely harmful. Society as a whole is harmed by the perpetuation of a market

that inflicts grievous harm upon its most vulnerable members. The unwilling potential recipient of the communication is harmed by the mental anguish of receiving the disgusting message and the fear that law enforcement may believe him or her to be involved in child pornography. And finally, children are harmed by the fuel that this communication adds to the fire of the child pornography industry.

II. The PROTECT Act Targets Commercial Speech that Advocates Illegal Conduct, as Well as Fraudulent and Misleading Communications that are Afforded No First Amendment Protection.

A. The PROTECT Act Applies Almost Exclusively to Commercial Speech.

By passing the PROTECT Act, Congress targeted and criminalized a narrow and very specific category of proscribable speech, namely, commercial speech that encourages and promotes illegal child pornography. Yet, the Eleventh Circuit held that the PROTECT Act's "pandering" provision violates the First Amendment because, under its analysis, the provision reached beyond commercial speech and unconstitutionally interfered with the more protected category of non-commercial speech.

The lower court intimated that the PROTECT Act extends too far by encompassing a group of situations where child pornography is discussed or exchanged, presumably with no exchange of currency and, therefore, touching upon non-commercial speech. Clearly, the inference drawn by the court was that in those circumstances where no financial or contemporaneous trading occurs, no commercial activity

occurs. And therefore, by extension, any speech relating to that non-commercial activity is non-commercial speech. While the court may have been correct in its factual observation, its analysis errs in restricting application of the commercial speech doctrine to exchanges involving monetary currency. The result is an ill-conceived loophole, whereby speech pandering child pornography—speech that is actually commercial in nature—is granted access to the great umbrella of constitutional protection reserved for non-commercial speech.

Indeed, in order for this Court to mark a clear and consistent path for its commercial speech doctrine, it must recognize that commercial activity to which speech relates often does not include direct exchange of goods and currency. To restrict the doctrine to such scenarios would be to approach the expansive universe of commerce blindly. Commercial transactions often occur when a good is exchanged today with the reasonable expectation that a reciprocal obligation or benefit will be realized in the future. After all, this is the textbook example of the barter model. To go even further, however, *amicus* would submit that commercial activity even exists when a savvy salesperson obscurely promotes or bolsters his/her product at such a time that the budding buyer is yet to even realize that he/she has become a likely participant in a commercial transaction. Clearly, such circumstances are "commercial" in the sense that they "[r]elate[] to [and are] connected with trade and traffic or commerce in general." *Black's Law Dictionary* 184 (Abr. 6th ed. 1991).

We see these and similar models taking place in the life of business all the time. For instance, requirements contracts clearly include an element of future expectations. But we also see this model at play in many online internet communities, particularly websites that facilitate the free

exchange of music and, for purposes of this case, child pornography. Within these internet communities, the unspoken—but very real—expectation is quite evident: You may receive a specific good (song or pornographic depiction of children), but you had better return the favor by providing the same or similar good for others when you can. Otherwise, these facilitating websites would be unable to survive, or even worse thrive, about which Congress seemed to be concerned. In effect, what occurs is a commercial hub of like-kind exchanges and *quid pro quos*, which are every bit as commercial as an immediate exchange of goods for other goods or currency. In the same way, mere chats within these same communities that relate to child pornography clearly lead to and are closely associated with imminent exchanges of downloads depicting child pornography. Consequently, speech relating to this type of commerce, including the class of speech that concerned the lower court, is commercial speech in the same way that a cigarette ad is commercial speech. Despite their differences in form, each promotes, or at least relates to, a potential and sought-after commercial transaction.

Moreover, the Eleventh Circuit determined that the PROTECT Act reaches non-commercial speech by expressing its concern over the statute's application to a small handful of hypothetical situations. For example, the court noted, "In a non-commercial context, any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials is a crime…even if what he or she actually has is a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." See App. 34a. Likewise, the court hypothesized that a grandparent forwarding emails that include innocent pictures of children in the bathtub could be prosecuted under this statute. See App. 40a-41a.

However, such an analysis fails to recognize this Court's repeated hesitation to strike down a statute on its face due to a small number of imagined scenarios. This Court has made clear that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). See also *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961, 967 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"). Instead, in order for an overbreadth challenge to stand, the opponent must show that there are "realistic" threats to protected speech. *Id.* at 801.

Consequently, the Eleventh Circuit's conclusion that the PROTECT Act goes too far in reaching the more protected category of non-commercial speech is fatally flawed. With the exception of a small number of imaginary circumstances, the PROTECT Act encompasses commercial speech—more particularly, illegal and fraudulent commercial speech. Indeed, the statute merely regulates direct illegal conduct by proscribing only speech in which the speaker knowingly "advertises, promotes, presents, distributes, or solicits" material that is or purports to be illegal. 18 U.S.C. 2252A(a)(3)(B) (2000 Supp. IV 2004). As Congress explained when passing this bill, "[t]he crux of what this provision bans is the offer to *transact*" in clearly proscribable child pornography. S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003); see H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003) (emphasis added).

B. It is a Cornerstone Principle of This Court's First Amendment Jurisprudence that Commercial Speech that Panders Illegal Conduct or is Fraudulent or Misleading Enjoys No Constitutional Protection.

This Court has judiciously declared, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Indeed, this theme has been placed at the heart of this Court's First Amendment jurisprudence for at least the past half-century, particularly in cases regarding commercial speech. As this Court has aptly observed, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 454 (1978).

Although *amicus* staunchly defends the freedom of expression and speech that is integral to the First Amendment's attempt to guarantee an open and robust free exchange of ideas, even we recognize that a small class of speech is so harmful to society that it finds itself utterly without constitutional protection. It has been for this reason that this Court has identified certain categories of speech that lie outside the umbrella of protection afforded by the First Amendment, including fraudulent and illegal commercial speech. In *Ohralik v. Ohio State Bar Assn.*, for instance, this Court determined that a lawyer's in-person solicitation of business with prospective clients posed a significant

potential for harm to those prospective clients and society in general. 436 U.S. 447. Consequently, this Court held that the right of a lawyer to speak about his or her services in this manner was outweighed by the great potential for harm to society.

Likewise, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, this Court noted, "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." 413 U.S. 376, 389 (1973). There, for example, Justice Powell, writing for the majority, went onto to explain, "We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Id.* at 388. "Nor would the result be different," Justice Powell continued, "if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and 'Prostitutes Wanted' rather than stated within the four corners of the advertisement." *Id.*

As these cases have illuminated over time, commercial speech that directly pertains to illegal activity enjoys no First Amendment protection and, thus, can be proscribed by the state. Perhaps this fundamental principle was best articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). In that case, the Court considered whether a regulation by the New York Public Service Commission that completely banned Central Hudson Gas & Electric Corp. from advertising to promote the use of electricity violated the First Amendment. Finding that the ban at issue did, as a

matter of law, violate the electric utility company's right to free speech, the Court went on to significantly crystallize the extent to which commercial speech is to be protected by the First Amendment. The Court ruled, "The government may ban forms of communication more likely to deceive the public than inform it...or commercial speech related to illegal activity." *Id.* at 563-564. In essence, the Court concluded that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Id.* at 563.

Applying these firmly established principles to the case at hand, this Court must find that the pandering of child pornography targeted by the PROTECT Act is clearly outside the bounds of legitimate speech and, therefore, is not protected by the First Amendment. Most importantly, the provision at issue only criminalizes communications that are "knowingly" made "in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography. 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).

As the plain language of this provision makes clear, in order to face criminal liability, the person must know that he or she is pandering illegal child pornography, which is clearly proscribable speech. Indeed, in the same way that this Court in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations* determined that speech used to promote and advertise prostitution and narcotics would be without First Amendment protection because it involves the pandering of illegal activity, the speech encompassed by the PROTECT Act—speech used to pander illegal child pornography—is likewise without constitutional protection. 413 U.S. 376 (1973). As this Court declared in *New York v. Ferber*, 458 U.S. 747, 761 (1982), the state has a "particular

and more compelling interest in prosecuting those who promote the sexual exploitation of children."

Moreover, to the extent that the provision extends beyond those individuals who pander illegal material, it clearly fails to reach beyond those communications which fraudulently lead another to believe that illegal child pornography is being offered. Yet, of course, like communications promoting and soliciting illegal economic activity, fraudulent commercial speech is equally proscribable. See *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563 (ruling that the government may ban forms of communication more likely to deceive the public than inform it). See also *Friedman v. Rogers*, 440 U.S. 1 (1979); *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1975).

As a result, the PROTECT Act is a constitutional attempt by Congress to reign in the horrors accompanying the widespread dissemination of child pornography. In so doing, Congress properly banned commercial speech that elicits illegal activity, defrauds others, and contributes to the exploitation of children.

CONCLUSION

For the aforementioned reasons, this Court should find that Congress's attempts to reign in the social evils accompanying child pornography by passing the PROTECT Act do not violate the First Amendment's guarantee of freedom of speech. In so doing, it should reverse the Eleventh Circuit's ruling.

Dated: June 8, 2007

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(16)

No. 06-694

JUN 11 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 17, 2006
CERTIORARI GRANTED: MAR. 26, 2007

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Docket No. 04-15128-JJ

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MICHAEL WILLIAMS, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS
	* * * * *
01/26/2005	Record Received in Miami Office from USDC
	* * * * *
02/7/2005	E-Brief Tendered: Appellant by Richard J. Diaz for Michael Williams
02/11/2005	E-Brief Tendered: Corrected Appellant Brief by Richard J. Diaz for Michael Williams
	* * * * *
03/1/2005	Motion to Supplement the Record and Stay Briefing Schedule: (Atty: Suzan H. Ponzoli)
	* * * * *

DATE	PROCEEDINGS
03/04/2005	Appellant Brief Filed: (Atty: Richard J. Diaz)
03/04/2005	Record Excerpts: (Atty: Richard J. Diaz)
03/08/2005	Appellee's Motion to Supplement the Record is GRANTED. The Court reporter shall ..file the transcript ..no later than 03/25/05 and Appellee shall deliver a copy of the Order to the court reporter. Appellee's brief is due 14 days after the transcript is filed in District Court. (FMH)
	* * * * *
04/05/2005	Corrected Appellee's Motion to Supplement the record is granted. The Court reporter shall ..file the transcript ..no later than 04/18/05 and Appellee shall deliver a copy of the Order to the court reporter. Appellee's brief is due ..May 2, 2005. (FMH) see ff
	* * * * *
04/18/2005	Record Received in Miami Office from USDC (1st supp)
	* * * * *
05/02/2005	Appellee Brief Filed: (Atty: Suzan H. Ponzoli)

DATE	PROCEEDINGS
05/02/2005	E-Brief Tendered: Appellee by Suzan H. Ponzoli for United States of America
	* * * * *
05/09/2005	Record on Appeal
	* * * * *
05/09/2005	1st Supplemental Record On Appeal: (Atty: Richard J. Diaz)
	* * * * *
02/01/2006	Oral Argument Scheduled: 02/01/06
	* * * * *
04/06/2006	Judgment Entered
	* * * * *
04/06/2006	Opinion Issued AFFIRMED/REVERSED/VACATED.
	* * * * *
05/30/2006	Petition for Rehearing En Banc: (Atty: Suzan H. Ponzoli)
07/17/2006	The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.

DATE	PROCEEDINGS
	* * * * *
07/25/2006	CASE CLOSED—Mandate Issued
07/25/2006	Mandate Issued
	* * * * *
08/10/2006	Record and Exhibits Returned to District Court: 2vroa, 1 vsroa, 1psi
	* * * * *
03/28/2007	Certiorari Granted #06-694: (Atty: Suzan H. Ponzoli)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Docket No. 1:04-cr-20299-DMM-ALL

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WILLIAMS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
04/30/2004	1	COMPLAINT as to Michael Williams [1:04-m -2511] (nf, Deputy Clerk) (Entered: 05/03/2004)
04/30/2004	2	ARREST of Michael Williams [1:04-m -2511] (pv, Deputy Clerk) (Entered: 05/03/2004)
		* * * * *
05/13/2004	7	INDICTMENT as to Michael Williams (1) count(s) 1-2 (Criminal Category 1) Magistrate Judge Ted E. Band-

DATE	DOCKET NUMBER	PROCEEDINGS
		stra (Preliminary Examination cancelled.) (mg, Deputy Clerk) (Entered: 10/07/2004)
		* * * * *
07/14/2004	37	MOTION by Michael Williams to dismiss Count I (Former Deputy Clerk) (Entered: 07/15/2004)
		* * * * *
07/16/2004	42	RESPONSE by USA as to Michael Williams re [37-1] motion to dismiss Count I (gz, Deputy Clerk) (Entered: 07/19/2004)
07/19/2004	43	Minutes of change plea held on 7/19/04 before Judge Adalberto Jordan as to Michael Williams; GUILTY: Michael Williams (1) count(s) 1-2 Court Reporter Name or Tape #: F. Salopek (Former Deputy Clerk) (Entered: 07/20/2004)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
07/19/2004	44	Plea Agreement as to Michael Williams (Former Deputy Clerk) (Entered: 07/20/2004)
	* * * * *	
08/20/2004	49	ORDER DENYING DEFENDANT'S MOTION TO DISMISS COUNT I OF INDICTMENT: ORDER as to Michael Williams denying [37-1] motion to dismiss Count I as to Michael Williams (1) (Signed by Donald M. Middlebrooks on 8/20/04) [EOD Date: 8/23/04] (Former Deputy Clerk) (Entered: 08/23/2004)
	* * * * *	
09/21/2004	52	OBJECTION by Michael Williams to Presentence Investigation Report as to Michael Williams (gz, Deputy Clerk) (Entered: 09/22/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
09/24/2004	55	Minutes of sentencing held on 9/22/04 before Judge Donald M. Middlebrooks as to Michael Williams; Court Reporter Name: Roger Watford (kw, Deputy Clerk) (Entered: 09/29/2004)
		* * * * *
09/24/2004	56	JUDGMENT as to Michael Williams (1) count(s) 1-2 imprisonment 60 months to be served concurrently; supervised release 2 years (Signed by Judge Donald M. Middlebrooks on 9/24/04) [EOD Date: 9/29/04] CCAP (kw, Deputy Clerk) (Entered: 09/29/2004)
10/01/2004	57	NOTICE OF APPEAL by Michael Williams re: [56-1] judgment order EOD Date: 9/29/04; Michael Williams (1) count(s) 1-2; Filing Fee: $ (FEE NOT PAID) Copies to

DATE	DOCKET NUMBER	PROCEEDINGS
		USCA, AUSA, USM, USPO and Counsel of Record. (pc, Deputy Clerk) (Entered: 10/04/2004)
		* * * * *
10/01/2004	58	MOTION by USA for a Preliminary Order of Forfeiture (Former Deputy Clerk) (Entered: 10/04/2004)
10/05/2004	59	PRELIMINARY ORDER OF FORFEITURE: ORDER as to Michael Williams granting [58-1] motion fora Preliminary Order of Forfeiture (Signed by Judge Donald Middlebrooks on 10/5/04) [EOD Date: 10/6/04] CCAP (Former Deputy Clerk) (Entered: 10/06/2004)
		* * * * *
12/07/2004	70	MOTION by USA as to Michael Williams for entry of final order of forfeiture (bs, Deputy Clerk) (Entered: 12/09/2004)

DATE	DOCKET NUMBER	PROCEEDINGS
12/16/2004	71	ORDER as to Michael Williams granting [70-1] motion for entry of final order of forfeiture as to Michael Williams (1) (Signed by Judge Donald M. Middlebrooks on 12/15/04) [EOD Date: 12/20/04] CCAP (kw, Deputy Clerk) (Entered: 12/20/2004)
12/28/2004	72	TRANSCRIPT filed as to Michael Williams of Sentencing Hearing held 9/22/04 @ 10:30am before Judge Donald L. Middlebrooks Pages: 1-23 re: [57-1] appeal. (nc, Deputy Clerk) (Entered: 12/28/2004)
		* * * * *
01/26/2005		Transmitted record on appeal to U.S. Court of Appeals as to Michael Williams: (Miami Office) Consisting of (1) Volume of Pleadings, (1) Volume of Transcripts and

DATE	DOCKET NUMBER	PROCEEDINGS
		(1) Sealed Envelope containing PSI Report [57-1] appeal (nc, Deputy Clerk) (Entered: 01/26/2005)
01/26/2005	76	Judgment Returned Executed as to Michael Williams on 1/11/05 at BOP FCI Miami, Florida (gz, Deputy Clerk) (Entered: 01/27/2005)
		* * * * *
04/11/2005	80	TRANSCRIPT filed as to Michael Williams of Plea Colloquy held 7/19/04 @ 9:12am before Judge Adalberto Jordan Pages: 1-40 re: [57-1] appeal. (nc, Deputy Clerk) (Entered: 04/13/2005)
04/14/2005	81	1st Supplemental transmitted to USCA as to Michael Williams re: [57-1] appeal by Michael Williams USCA # 04-15128-B (nc, Deputy Clerk) (Entered: 04/14/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
04/14/2005		1st Supplemental Transmitted record on appeal to U.S. Court of Appeals as to Michael Williams: (Miami Office) Consisting of (1) Volume of Transcript[57-1] appeal (nc, Deputy Clerk) (Entered: 04/14/2005)
	* * * * *	
07/28/2006	85	MANDATE OF USCA (certified copy) as to Michael Williams RE: [57-1] appeal conviction reversed and sentence on count(s) 1 vacated , and affirming judgment/ order of the district court on count(s) 2 with court's opinion Date Issued: 7/25/06 Appeal #: 04-15128-JJ; Copy to Judge. (nc, Deputy Clerk) Modified on 08/03/2006 (Entered: 07/31/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
08/15/2006	86	Record on appeal returned from U.S. Court of Appeals: (Miami/Records) Consisting of (1) Volume of Pleadings, (2) Volumes of Transcripts and (1) PSI Report [57-1] appeal by Michael Williams USCA #: 04-15128-JJ (nc, Deputy Clerk) (Entered: 08/16/2006)
	* * * * *	
04/17/2007	89	ORDER as to Michael Williams re 88 Response filed by USA, Government will advise this Court when the Supreme Court reaches a final determination as to the constitutionality of count 1. Signed by Judge Donald M. Middlebrooks on 4/17/2006. (ls) (Entered: 04/17/2007)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. [04-cr-20299CR-MIDDLEBROOKS]
18 U.S.C. § 2252A(a)(3)(B)
18 U.S.C. § 2252A(a)(5)(B)
18 U.S.C. § 2253(a)

UNITED STATES OF AMERICA

vs.

MICHAEL WILLIAMS

[Filed: May 13, 2004]

INDICTMENT

The Grand Jury charges that:

COUNT 1

On or about April 26, 2004, in Miami-Dade County, in the Southern District of Florida and elsewhere, the defendant,

MICHAEL WILLIAMS,

did knowingly advertise, promote, and present material, in interstate commerce, by computer, in a manner that reflected the belief and that was intended to cause another to believe that the material contained an obscene visual depiction of a minor engaging in sexually explicit conduct and a visual depiction of an actual minor

engaging in sexually explicit conduct, that is, photographs with the following names:

1) !+!+ycs.jpg
2) -++++++++++++++++++++++++++++ 11yo+asian.jpg
3) 01- - - 5.jpg
4) 01- - - 6.jpg
5) 1.jpg
6) Pedofilia_fodendo16+(1).jpg
7) preteen+lolita+incest+ddogprn%60kdad.jpg

All in violation of Title 18, United States Code, Section 2252A(a)(3)(B) and (b)(1).

COUNT 2

On or about April 30, 2004, in Monroe County, in the Southern District of Florida, the defendant,

MICHAEL WILLIAMS,

did knowingly possess computer disks that contained images of child pornography, as defined in Title 18, United States Code, Section 2256(8)(A) and (B), that had been transported in interstate and foreign commerce by computer, that is, computer files with the following names:

1) !!!!!!!!Dad[1].jpg
2) Yung spred.jpg
3) cum shot.jpg
4) Babyshidaddy014.jpg
5) Babyshihelpless017.jpg

6) Babyshivid-sample4.jpg
7) Cindi+-bf+-4yo.jpg
8) dad+and+dau+5.jpg
9) brown11.jpg
10) action0276.jpg
11) 202572141g.jpg
12) Lilsuck.jpg
13) 4yroldsucker.jpg
14 win386.swp
15) photo by carl.jpg

All in violation of Title 18, United States Code, Section 2252A(a)(5)(B) and (b)(1).

FORFEITURE

a. The allegations of Counts 1 and 2 of this Indictment are realleged and by this reference fully incorporated herein for the purpose of alleging forfeitures to the United States of America pursuant to the provisions of Title 18, United States Code, Section 2253(a).

b. Upon conviction of any of the felony violations alleged in Counts 1 and 2 of this Indictment, the United States is entitled to forfeiture of and the defendant, **MICHAEL WILLIAMS**, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 2253(a), any matter which contains any visual depiction of a minor engaged in sexually explicit conduct which was transported, shipped or received in violation 18 U.S.C. § 2251 *et. seq.*; any property, real or personal, used or intended to be used to commit, or to promote the

commission of, the violations alleged in Counts 1 and 2 of this Indictment; and any property, real or personal, constituting or traceable to gross profits or other proceeds which the defendant obtained from the violation(s) alleged in Counts 1 and 2 of this Indictment. Such forfeitures shall include, but are not limited to, two computers, and accompanying storage media, including hard drives CDs, seized at the defendant's residence at 34 Avenue A, Key Largo, Florida on April 30, 2004.

c. Pursuant to Title 18, United States Code, Section 2253(o), if any of the forfeitable property, or any portion thereof, as a result of any act or omission of the defendant:

(i) cannot be located upon exercise of due diligence;

(ii) has been transferred, or sold to, or deposited with a third party;

(iii) has been placed beyond the jurisdiction of the Court;

(iv) has been substantially diminished in value; or

(v) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States to seek the forfeiture of other property of the defendant up to the value of the above-described forfeitable property.

All pursuant to Title 18, United States Code, Section 2253.

A TRUE BILL

/s/ [ILLEGIBLE]
FOREPERSON

/s/ [ILLEGIBLE]
UNITED STATES ATTORNEY

/s/ GREGORY S. MUNSON
GREGORY S. MUNSON
ASSISTANT UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 04-cr-20299-CR-DMM

UNITED STATES OF AMERICA

vs.

MICHAEL WILLIAMS

[Filed: July 19, 2004]

PLEA AGREEMENT

The United States of America and Michael Williams (hereinafter referred to as the "defendant") enter into the following agreement:

1. The defendant agrees to plead guilty to count one and two of the indictment, which counts charge the defendant with advertising, promoting, or presenting material reflecting the belief that the material contained an obscene visual depiction of a minor engaging in sexually explicit conduct or an actual minor engaging in sexually explicit conduct, in violation of Title 18, United States Code, Section 2252A(a)(3)(B), and possession of child pornography, in violation of Title 18, United States Code, Section 2252A(a)(5)(B).

* * * * *

8. The United States and the defendant agree that the defendant's right to appeal whether 18 U.S.C.

§2252A(a)(3)(B) is constitutionally overbroad under the First Amendment to the U.S. Constitution is preserved.

* * * * *

MARCOS DANIEL JIMENEZ
UNITED STATES ATTORNEY

Date: [July 19, 2004]

By: /s/ GREGORY M. MUNSON
GREGORY M. MUNSON
ASSISTANT UNITED STATES ATTORNEY

Date: [July 19, 2004]

By: /s/ LUIS I. GUERRA
LUIS I. GUERRA
ATTORNEY FOR DEFENDANT

Date: [July 19, 2004]

By: /s/ MICHAEL WILLIAMS
MICHAEL WILLIAMS
DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 04-20299-CR-DMM

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WILLIAMS, DEFENDANT

July 19, 2004
9:12 a.m.

TRANSCRIPT OF PLEA COLLOQUY HAD BEFORE THE HONORABLE ADALBERTO JORDAN, UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE GOVERNMENT:

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Miami, Florida 33134

* * * * *

[29]

* * * * *

THE COURT: All right. Mr. Williams, please listen carefully. I'm going to have Mr. Munson explain in proffer form what the government would be able to prove as to Counts I and II, and once he's done, I'm going to ask you whether you agree or disagree with the facts that he has related.

Mr. Munson.

MR. MUNSON: Thank you, your Honor.

Had this case proceeded to trial, the United States would have proven beyond a reasonable doubt that on April 26, 2004, Special Agent Tim Devine of the U.S. Secret Service logged into Yahoo—logged into a yahoo chat room "Pertensactionsuncensored1." Based on that chat occurring in the chat room and the title of the chat room, Special Agent Devine recognized the chat room as dedicated to child pornography. Special Agent Devine logged on using user name "Lisa_n_Miami," hereinafter "LNM."

After entering the chat room, Special Agent Devine saw a public message, that is, a message anyone in the chat room could see on their computer, from the user name "Twatjuicesucker2004," hereinafter "T4," stating that, "Dad of toddler has 'good' pics of her and me for

swap of your toddler pics or live cam." T4 and LNM engaged in private Internet chat in which they swapped non-pornographic [30] photographs. After sending and receiving photographs, T4 asked for additional pictures of LNM's daughter. When these pictures were not received, T4 accused LNM of being a cop. LNM responded by accusing T4 of being a cop.

After repeating these accusations in the public part of the chat room, T4 posted a message stating, "HERE ROOM; I CAN PUT UP LINK CUZ IM FOR REAL —SHE CANT," which was immediately followed by a computer hyperlink. The computer hyperlink contained, among other things, seven images of actual minors engaging in sexually explicit conduct. The hyperlink travelled in interstate or foreign commerce when it was posted.

On April 30, 2004, U.S. Secret Service agents executed a search warrant for 34 Avenue A, Key Largo, Florida. During the search, the defendant, Michael Williams, returned to 34 Avenue A, Key Largo, Florida. Agents recovered three hard drives from the residence, and recovered images from two hard drives as part of a forensic computer examination. The examination revealed, among other things, that the computer contained 15 pictures of actual minors engaged in sexually explicit conduct. The images had been downloaded over the internet and travelled in interstate commerce before being downloaded to the hard drive. The computer software on the computer was registered to Michael Williams, and the hard drives also contained images of the [31] defendant in the residence at 34 Avenue A, Key Largo, Florida.

In a post-Miranda statement, the defendant admitted being Twatjuicesucker2004, stated that he was the only person who used that account, and admitted that he lived alone at 34 Avenue A, in Key Largo and admitted using the computer to view adult and child pornography.

THE COURT: Okay. Mr. Munson, the seven images that were posted on the hyperlink are the seven images referenced in Count I?

MR. MUNSON: That's correct, your Honor. And as to Count II, the 15 images contained on the hard drive are the images that were charged in Count II of the indictment.

THE COURT: Okay. Again, this is not my case and I'm not familiar with it. These deal with actual depictions of actual minors, or they are—or it's virtual child pornography?

MR. MUNSON: These are actual minors, your Honor. That's the testimony our pediatrician would have presented at trial.

THE COURT: Okay. Thank you very much, Mr. Munson.

Mr. Williams, did you understand the facts set forth by Mr. Munson in his proffer?

THE DEFENDANT: Yes, sir, I did.

THE COURT: Do you agree or disagree with those [32] facts?

THE DEFENDANT: I agree with them.

THE COURT: How do you plead to the charges set forth in Counts I and II of the indictment, Mr. Williams,

reserving your right to appeal the denial of the motion to dismiss Count I? Guilty or not guilty.

THE DEFENDANT: Count I, guilty.

THE COURT: And Count II?

THE DEFENDANT: Count II, guilty.

THE COURT: All right. You understand, Mr. Williams, before I adjudicate you guilty, that whatever success you may have with regard to your guilty plea on Count I is not going to affect your adjudication of guilt on Count II. It may affect the sentencing issues, but it's not going to have any effect on your adjudication of guilt on Count II. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

THE COURT: All right. It is the finding of this Court that Michael Williams is fully competent and capable of entering an informed plea, that Mr. Williams is aware of the nature of the charges and of the consequence of the plea, and that the guilty pleas are knowing and voluntary ones, supported by an independent basis in fact containing each of the essential elements of the two charged offenses. The guilty plea is, therefore, accepted, and Mr. Williams is now [33] adjudged guilty of the offenses charged in Counts I and II of the indictment.

* * * * *

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Supreme Court, U.S.
FILED
JUN 11 2007
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No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 2252A(a)(3)(B) of Title 18 of the United States Code (Supp. IV 2004) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography.

The question presented is whether Section 2252A(a)(3)(B) is overly broad and impermissibly vague, and thus facially unconstitutional.

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In the Supreme Court of the United States

No. 06-694

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 444 F.3d 1286. The opinion and order of the district court (Pet. App. 46a-69a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2006. A petition for rehearing was denied on July 17, 2006 (Pet. App. 70a-71a). On October 6, 2006, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 14, 2006. On November 6, 2006, Justice Thomas further extended the time to December 14, 2006. The petition for a writ of certiorari was filed on November 17, 2006, and granted on March 26, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth in the appendix. App., *infra*, 1a-15a.

STATEMENT

Following the entry of a guilty plea in the United States District Court for the Southern District of Florida, respondent was convicted of one count of knowingly advertising, promoting, and presenting material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography, in violation of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004), and one count of possession of computer disks that contained images of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) (Supp. IV 2004). He was sentenced to 60 months of imprisonment on each count, to run concurrently, to be followed by two years of supervised release. The court of appeals reversed respondent's conviction on the Section 2252A(a)(3)(B) count, holding that the provision was overbroad and impermissibly vague, and therefore facially unconstitutional. Pet. App. 1a-45a.

1. a. Congress enacted 18 U.S.C. 2252A(a)(3)(B) in the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act). Section 2252A(a)(3)(B) provides, in pertinent part, that anyone who knowingly "advertises, promotes, presents, distributes, or solicits * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" contains illegal child pornography (*i.e.*, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual

depiction of an actual minor engaging in sexually explicit conduct") commits a criminal offense. 18 U.S.C. 2252A(a)(3)(B)(i) and (ii) (Supp. IV 2004).[1]

Congress passed Section 2252A(a)(3)(B) in the wake of *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court held unconstitutional two provisions that expanded the definition of illegal child pornography, both of which were enacted in the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 3009-26. One provision, 18 U.S.C. 2256(8)(B), defined "child pornography" to include a visual depiction that "is, or appears to be," of a minor engaging in sexually explicit conduct. The second provision, 18 U.S.C. 2256(8)(D), defined "child pornography" to include a visual depiction "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." The Court held that those provisions were substantially overbroad in violation of the First Amendment because they "proscribe[d] a significant universe of speech that is neither obscene under *Miller* [v. *California*, 413 U.S. 15 (1973)] nor child pornography under [*New York* v. *Ferber*, 458 U.S. 747 (1982)]." *Free Speech Coal.*, 535 U.S. at 240; see *id.* at 256-258. The Court explained that non-obscene depictions of sexually explicit conduct could be banned consistent with the First Amendment only if they involved real children, because only the need to protect real children from sexual abuse could justify dispensing with the re-

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[1] Unless otherwise noted, all reference to 18 U.S.C. 2252A(a)(3)(B) is to the Supp. IV 2004 edition.

quirement that material be shown to be obscene before it can be prohibited. *Id.* at 256.

With respect to Section 2256(8)(D), the pandering provision, the Court noted that it "punishe[d] even those possessors who took no part in pandering." *Free Speech Coal.*, 535 U.S. at 242-243. Thus, "[m]aterial[] falling within the proscription [was] tainted and unlawful in the hands of all who receive[d] it, though they b[ore] no responsibility for how it was marketed, sold, or described." *Id.* at 258. See *ibid.* (provision not only prohibits pandering but also prohibits "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain").

In response to *Free Speech Coalition*, Congress passed the PROTECT Act, aimed at revising those portions of the CPPA that this Court found unconstitutional to comply with "the limitations established by that decision." S. Rep. No. 2, 108th Cong., 1st Sess. 6 (2003). As particularly relevant here, Congress repealed Section 2256(8)(D), which had defined child pornography to include a visual depiction that had been pandered as such. In its stead, Congress added a new section, codified at 18 U.S.C. 2252A(a)(3)(B), targeting the act of pandering and solicitation itself by "criminaliz[ing] offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography." *Id.* at 10. Congress recognized that the "internet has provided a ready forum for those who wish to traffic in child pornography," and it sought to "check this rapidly growing market." *Ibid.*

Congress stressed that the provision was "written narrowly." S. Rep. No. 2, *supra*, at 10. As Congress explained, "[t]he crux of what this provision bans is the offer to transact in this unprotected material, coupled

with proof of the offender's specific intent." *Id.* at 12. Congress further explicated:

> [F]or example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography.

H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61 (2003). Congress made clear that "no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent." *Id.* at 61-62. That is so because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." *Id.* at 62.

b. Congress made 15 legislative findings that explain the reasons for the provisions of Section 501 in the PROTECT Act. Pub. L. No. 108-21, 117 Stat. 676.[2] In those statutory findings, Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760).

Congress found that child pornography "results from the abuse of real children by sex offenders." § 501(12), 117 Stat. 678. More specifically, Congress found that

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[2] The congressional findings are reproduced in the notes to 18 U.S.C. 2251 (Supp. IV 2004) and in the appendix to the brief (App., *infra*, 11a-15a).

there was "no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." § 501(7), 117 Stat. 677. In addition, Congress found "that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated." § 501(5), 117 Stat. 676. Congress found, however, that, since this Court's decision in *Free Speech Coalition*, "defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real." § 501(10), 117 Stat. 677.

Congress outlined the difficulties of proof in this area, including that "[c]hild pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker." § 501(8), 117 Stat. 677. Congress further found that "[t]he number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before." § 501(10), 117 Stat. 677. Congress noted that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678.

2. On April 26, 2004, a federal agent logged into an Internet chat room on Yahoo! entitled "per ten's action

uncensored:1."[3] Based on the title of the chat room and the messages posted in it, the agent recognized it as one dedicated to child pornography. The agent saw a public message (*i.e.*, a message that anyone in the chat room could see on his computer), from someone with the sexually graphic screen name (*i.e.*, pseudonym) "Twatjuicesucker2004," which was later traced to respondent. Respondent's public message stated: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." Pet. App. 2a; J.A. 22-23.

The agent engaged respondent in a private Internet chat. During that chat, respondent stated that his daughter was two years old and that he had nude photographs of her. Respondent also told the agent that he had engaged in sexual activity with an 11-month-old child and that he had nude photographs of his daughter "in folder on puter." Presentence Investigation Report para. 6 (PSR); Br. in Opp. 4.

Using Yahoo!'s file transfer system, respondent and the agent swapped non-pornographic photographs. Pet. App. 2a; PSR para. 7. Following the photograph exchange, respondent claimed that he had sexually explicit photographs of his young daughter, stating: "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you??" Pet. App. 2a. When respondent asked the agent for additional pictures and none was forthcoming, respondent accused the agent of being a cop. The agent answered by accusing respondent of being a cop. After repeating these accusations in the public part of the chat room, respondent posted a message stating: "HERE ROOM; I CAN PUT UPLINK CUZ

[3] Although the plea transcript indicates that the title of the chat room has an "s" on the word "action," J.A. 22, that is a mistranscription. Presentence Investigation Report para. 6; Br. in Opp. 3.

IM FOR REAL—SHE CANT." The message was immediately followed by a computer hyperlink that contained, among other things, seven images of actual minors, approximately five to 15 years old. The children in the images were nude and were displaying their genitals, engaging in sexually explicit conduct, or both. *Id.* at 2a-3a; J.A. 23.[4]

3. After reserving the right to challenge the constitutionality of Section 2252A(a)(3)(B), respondent pleaded guilty to both counts in the indictment. Pet. App. 47a; J.A. 19-25. The district court denied respondent's motion to dismiss the Section 2252A(a)(3)(B) count based on the claim that the provision was unconstitutionally overbroad and vague. Pet. App. 46a-69a. The district court concluded that the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Id.* at 65a. The court noted that the statute "does not criminalize mere possession," but rather prohibits "the pandering in material which is not protected by the First Amendment." *Ibid.*

4. The court of appeals reversed in relevant part. Pet. App. 1a-45a.

a. The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornogra-

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[4] A subsequent search of respondent's trailer resulted in the seizure of two computer hard drives that held at least 22 images of actual minors engaged in sexually explicit conduct or lascivious display of genitalia. Most of the images depicted prepubescent children, as well as sado-masochistic conduct or other depictions of pain. Pet. App. 3a; J.A. 15-16, 22; PSR para. 14.

phy under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a. The court further acknowledged that "[t]he materials touted by [respondent] in this case were clearly illegal child pornography." See *id.* at 21a n.54; *id.* at 18a (noting that "the materials [respondent] possessed were unquestionably depictions of 'real' children"). And the court did not question the "extraordinary importance" of protecting "children against sexual abuse and predatory pedophiles" and the need for "strong federal laws" to address that governmental interest. *Id.* at 6a.

The court noted that Congress "remedie[d] the problem" identified by *Free Speech Coalition* of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App. 16a. As the court explained, Congress accomplished this "[b]y moving the pandering provision from the definitions section to a stand-alone status, and using language that targets only the act of pandering." *Ibid.* The court also noted that Congress "beef[ed] up its findings" on the increased prosecutorial difficulties caused by the "ready availability" of technology that can make pictures of real children unidentifiable or appear to be computer-generated. *Id.* at 17a.

b. Nevertheless, the court of appeals held that Section 2252A(a)(3)(B) was facially unconstitutional on overbreadth and vagueness grounds. Pet. App. 37a, 42a, 44a. In addressing respondent's overbreadth challenge, the court noted that Section 2252A(a)(3)(B) would likely pass constitutional muster "[i]f all that the pandering provision stood for was that individuals may not com-

mercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." *Id.* at 20a-21a. This was so, the court concluded, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Id.* at 21a. Because the court believed, however, that Section 2252A(a)(3)(B) is "not limited to commercial exploitation" but encompasses non-commercial speech as well, the court went on to consider whether "the restriction on such non-commercial speech is constitutionally overbroad." *Id.* at 22a.

In so doing, the court reasoned that Section 2252A(a)(3)(B) was "problematic" for three reasons. Pet. App. 22a. First, because the "pandered child pornography need only be 'purported'" to be covered by the statute, the court was concerned that the statute sweeps in material that either does not in fact exist or that does not satisfy the legal definition of child pornography. *Ibid.* Second, in the court's view, the provision bans protected speech in the form of "the description or advocacy of illegal acts" in circumstances that do not rise to the level of "immediate incitement." *Id.* at 23a & n.58. Third, the court found "particularly objectionable the criminalization of speech that 'reflects the belief' that materials" are illegal child pornography because, in the court's view, the provision punishes "a defendant's beliefs that simulated depictions of children are real or that innocent depictions of children are salacious." *Id.* at 26a. As the court understood Section 2252A(a)(3)(B), the requirement of the intent to traffic in illegal pornography "only applies to one portion of the provision—promoting material in a manner 'that is intended to cause another to believe' it is illicit." *Id.* at 35a.

Accordingly, the court concluded that Section 2252A(a)(3)(B) "abridges the freedom to engage in a substantial amount of lawful speech in relation to its legitimate sweep," and held that it was unconstitutionally overbroad. Pet. App. 36a-37a.

c. With respect to respondent's vagueness argument, the court was concerned that, because Section 2252A(a)(3)(B) requires neither that the pandered material depict real children nor "that any 'purported' material * * * actually exist," and because the court read the "reflects the belief" portion of the statute as having "no intent requirement," the government could establish a violation of the provision with proof of any communication deemed "reflective of perverse thought." Pet. App. 39a-40a. The court further concluded that "the determination of what constitutes presentation in a 'manner that is intended to cause another to believe' that material contains illegal child pornography," was "[e]ven more complex." *Id.* at 40a. In the court's view, the provision could capture an email entitled "Good pics of kids in bed" sent by a grandparent, with innocent pictures attached of grandchildren in pajamas. *Ibid.*

SUMMARY OF ARGUMENT

Congress constitutionally prohibited offers to provide, or solicitations to receive, material that purports to be unprotected child pornography. Section 2252A(a)(3)(B) represents Congress's effort to remedy the constitutional problems in the pandered-materials provision struck down in *Free Speech Coalition*. Congress found that offers to provide or solicitations to receive what purports to be child pornography fuel the market for such material, thus causing harm to real chil-

dren. Nothing in the Constitution prevents Congress from seeking to suppress such conduct.

I. Section 2252A(a)(3)(B) is consistent with the First Amendment.

A. The conduct covered by Section 2252A(a)(3)(B) enjoys no First Amendment protection. To the extent that the provision covers commercial offers and solicitations, it clearly implicates no First Amendment interests, because "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." Pet. App. 21a. The same is true of non-commercial offers or solicitations of unprotected child pornography. Speech offering to provide, or seeking to receive, illegal material has the same low value and the same damaging social consequences, regardless of whether the exchanges are proposed for profit or for free. Just as the government can ban offers to *sell* drugs without infringing the First Amendment, see *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973), so too can it ban offers to give drugs away for free. The same analysis applies to unprotected child pornography.

Congress also has a compelling interest in drying up the market for child pornography and thus removing an incentive to create it. See *New York* v. *Ferber*, 458 U.S. 747 (1982); *Osborne* v. *Ohio*, 495 U.S. 103 (1990). Regulation of even non-commercial solicitations or offers of child pornography furthers that goal, because individuals who offer or solicit what purports to be child pornography create the appearance of demand or supply, and thereby fuel the market for such material. Such communications also facilitate exchanges. Traffic in contraband can only occur if purveyors or consumers can signal each other that the items are available and desired.

In the underground child-pornography market, where much of the material is traded or exchanged through clandestine networks or postings in chat rooms, communications that alert others to the existence of the material, or the desire to acquire it, are vital links in its dissemination.

Congress thus may legitimately take aim at such communications as a direct means of suppressing the production and circulation of child pornography. Nothing in this Court's jurisprudence precludes that action. The imminent-incitement test of *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), applies to limitations on "mere advocacy" or speech that has a "mere tendency" to encourage unlawful activity, but the offers, promotions, and solicitations covered by Section 2252A(a)(B)(3) are not such speech. Nor are speakers protected because their offers or solicitations of child pornography may be false, or based on misconceptions about the nature of the material at issue. Intentional false offers of or solicitations for contraband enjoy no constitutional protection. Likewise, communications reflecting a "deluded belief" that the materials involve real child pornography, Pet. App. 23a, are not constitutionally protected. The statute does not punish mere "thoughts," *id.* at 26a, but applies only when an objectively reasonable person would conclude from the context that the speaker is offering or seeking real child pornography. In addition, the speaker subjectively must know that the material is represented in that manner, and either have the belief that the material was child pornography or intend to cause another person to have that belief. Even if a speaker is wrong about the nature of the material, speech that objectively purports to offer real child pornography threatens the evils that Congress

sought to forestall, and the mental-state elements of the offense protect against unwitting violations of the statute.

B. Even if Section 2252A(a)(3)(B) could be construed to reach some protected speech, it is not substantially overbroad. A statute is not facially overbroad unless its application to protected speech is not only real, but substantial in relation to the law's legitimate sweep. The court of appeals made no effort to apply that test. Instead of seeking to quantify the legitimate applications of the law and compare them to invalid applications, the court relied on a few abstract hypotheticals (none of which involved mainstream media, artistic endeavors, or realistic scenarios) to conclude that the law is overbroad. The statute primarily applies, however, to cases like this one, in which the unprotected nature of the speech is beyond dispute. And even if narrow circumstances could be imagined in which the statute would reach protected speech, the remedy would be an as-applied challenge rather than the radical step of facially invalidating the law.

II. Section 2252A(a)(3)(B) is not impermissibly vague. The Due Process Clause requires that a criminal statute give fair warning of its prohibitions and adequately guide the discretion of law enforcement. Properly construed, the provision clearly reaches only its target: pandering or soliciting what purports to be unprotected child pornography. The statute protects against uncertain applications by requiring that the "manner" of any offer or solicitation objectively reflect the belief, or the intention to cause another to believe, that the materials at issue are proscribable child pornography. And the definition of the covered materials

precisely tracks this Court's description of proscribable child pornography.

To the extent that the Court rejects respondent's overbreadth claim, it should also reject any effort to invalidate the statute on its face on grounds of purported vagueness as to others. The statute clearly covers respondent's statements and gives law enforcement adequate guidance on that point. But even looking beyond respondent's conduct, the court of appeals' fears of vagueness rest on hypotheticals that fall outside of Section 2252A(a)(3)(B). Section 2252A(a)(3)(B) takes a statement's context fully into account, and it thus does not ensnare innocent and unwary speakers.

ARGUMENT

CONGRESS'S PROHIBITION OF OFFERING OR SOLICITING WHAT PURPORTS TO BE UNPROTECTED CHILD PORNOGRAPHY IS CONSTITUTIONAL

Congress unquestionably has the power to proscribe offers or solicitations to transact in illegal narcotics or other contraband. Nothing in the First Amendment restricts that authority, even though such offers or solicitations take the form of speech, because offers and solicitations of illegal products are not protected by the First Amendment. Nor are misleading offers of material purported to be contraband protected by the First Amendment. Congress may forbid offers and solicitations of what purports to be illegal child pornography to suppress the illegal child-pornography market and protect the children who are harmed by its production and circulation.

I. SECTION 2252A(a)(3)(B) CAPTURES NO PROTECTED SPEECH AND, IN ANY EVENT, IS NOT OVERBROAD

Section 2252A(a)(3)(B) reaches a person who knowingly "advertises, promotes, presents, distributes, or solicits" real child pornography or purportedly real child pornography. As Congress explained, the statute "bans the offer to transact in unprotected material." H.R. Conf. Rep. No. 66, *supra*, at 61; see S. Rep. No. 2, *supra*, at 12. It "criminalizes offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography." *Id.* at 10.

The court of appeals recognized that subsections (i) and (ii) of Section 2252A(a)(3)(B) "capture perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence," Pet. App. 19a, specifically, "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B)(i) and (ii). The court also observed (Pet. App. 16a) that the PROTECT Act cured the "primary objection" to the pandering provision struck down as overbroad by this Court in *Free Speech Coalition*. The provision at issue there imposed criminal penalties on anyone who possessed materials "described, or pandered, as child pornography by someone earlier in the distribution chain." *Ashcroft* v. *Free Speech Coal.*, 535 U.S. 234, 258 (2002). Section 2252A(a)(3)(B), by contrast, "targets only the act of pandering" and therefore fully "remedies the problem" of penalizing downstream possession. Pet. App. 16a. As suggested by this Court in *Free Speech Coalition*, Section 2252A(a)(3)(B) applies only to those who "bear responsibility for how [materials

are] marketed, sold, or described" by doing no "more than prohibit[ing] pandering." 535 U.S. at 258.

Properly understood, Congress's prohibition against pandering and solicitation of what purports to be contraband is constitutional. Such acts are wholly unprotected under the First Amendment. And even if Section 2252A(a)(3)(B) did reach some instances of protected speech, respondent cannot demonstrate, and the court of appeals did not find, that the statute is substantially overbroad in relation to its plainly legitimate sweep.

A. Section 2252A(a)(3)(B) Reaches No Constitutionally Protected Speech

1. Offers or solicitations to sell, buy, or barter contraband—whether true or false—are unprotected by the First Amendment

The court of appeals recognized that Section 2252A(a)(3)(B) would likely be constitutional "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were." Pet. App. 20a-21a. The court observed that "the First Amendment allows the absolute prohibition of both truthful advertising of an illegal product and false advertising of any product." *Id.* at 21a. That observation is unquestionably correct.

This Court has repeatedly held that speech that proposes an illegal commercial transaction falls entirely outside the scope of First Amendment protection. See, *e.g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 497 n.7 (1996) (plurality opinion) ("[T]he First Amendment does not protect commercial speech about unlawful activities."); *Zauderer* v. *Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 638 (1985) ("The States and

the Federal Government are free to prevent the dissemination of commercial speech * * * that proposes an illegal transaction."); *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 563-564 (1980); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (*Virginia Pharmacy*).[5]

Likewise, as the court of appeals concluded (Pet. App. 21a), "false, deceptive, or misleading commercial speech may be banned." *Ibanez* v. *Florida Dep't of Bus. & Prof'l Reg.*, 512 U.S. 136, 142 (1994); see, *e.g.*, *Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *Virginia Pharmacy*, 425 U.S. at 771; *Konigsberg* v. *State Bar*, 366 U.S. 36, 49 & n.10 (1961). Surely, the authority to ban such false or deceptive speech is at its zenith when the representation involves a false claim that material is contraband.

2. Non-commercial efforts to solicit, to distribute, or to offer to distribute illegal contraband are similarly unprotected by the First Amendment

a. As the court of appeals recognized (Pet. App. 22a), Section 2252A(a)(3)(B) is not limited to commercial

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[5] This Court has defined commercial speech as speech that does "no more than propose a commercial transaction," *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia Pharmacy*, 425 U.S. at 762), or as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson*, 447 U.S. at 561. Speech proposing a barter or trade fits comfortably within either definition.

speech; it also reaches non-commercial solicitation, distribution, or offers to provide child pornography. But the fact that a transaction involving contraband is non-commercial does not entitle the speech proposing it to First Amendment protection. It is the *illegal* nature of the contraband offered or sought, not the commercial nature of the transaction, that makes such proposals unprotected under the First Amendment. "A direct solicitation of unlawful activity may of course be proscribed, whether or not it is commercial in nature." *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) (Thomas, J., concurring).

In *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), the Court rejected a First Amendment challenge to an ordinance that forbade newspapers from carrying "help-wanted" advertisements in gender-designated columns where such gender discrimination constituted an unlawful employment practice. *Id.* at 389. Although the newspaper contended that "the exchange of information * * * in the commercial realm" warranted the full protection of the First Amendment, *id.* at 388, the Court stated that, "[w]hatever the merits of this contention may be in other contexts," the want-ads in question were not protected because they proposed an illegal transaction. *Id.* at 388-389. The Court explained that "[d]iscrimination in employment is not only commercial activity, it is *illegal* commercial activity." *Id.* at 388. The Court expressed "no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Ibid.* Likewise, the Court observed that the result would be the same "if the nature of the transaction were indicated by placement under columns captioned 'Narcotics for Sale' and

'Prostitutes Wanted' rather than stated within the four corners of the advertisement." *Ibid.*

The reasoning in *Pittsburgh Press* is not limited to the commercial context; rather, it accords with the common sense notion that speech proposing illegal activity can be just as injurious if offered for free as if offered for profit. Just as an advertisement offering to sell narcotics can be banned, *Pittsburgh Press*, 413 U.S. at 388, so too can an advertisement offering to give narcotics away gratis. Each inflicts comparable social evils (*e.g.*, the spread of illegal drugs), and the purpose of regulating the underlying activity does not focus on its commercial character. See *Virginia Pharmacy*, 425 U.S. at 759 (observing that *Pittsburgh Press* turned not on the commercial nature of the speech, but on the ground that "the discriminatory hirings proposed by the advertisements, and by their newspaper layout, were themselves illegal").

A constitutional rule that immunized non-commercial offers to engage in criminal activity would contradict this Court's longstanding recognition that speech that has violation of the law as its "sole immediate object" is not protected by the First Amendment. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949). It is hard to imagine a more immediate criminal object than the offering of or solicitation for materials that cannot be legally possessed. And it certainly makes no difference that the act of non-commercial offering or soliciting involves speech. A wide range of criminal offenses, including solicitation, conspiracy, and aiding and abetting, involve speech. Yet the courts have never questioned the government's power to regulate such speech. See *Brown* v. *Hartlage*, 456 U.S. 45, 55 (1982) ("[W]hile a solicitation to enter into an agreement arguably crosses

the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may be properly prohibited."); *Konigsberg*, 366 U.S. at 50 & n.10 (observing that "solicitation of crime" is "outside the scope of constitutional protection"); *United States* v. *Freeman*, 761 F.2d 549, 552 (9th Cir. 1985) (Kennedy, J.) ("[W]here speech becomes an integral part of the crime, a First Amendment defense is foreclosed even if the prosecution rests on words alone."), cert. denied, 476 U.S. 1120 (1986).

This Court in *Free Speech Coalition* thought it obvious that "[t]he Government, of course, may * * * enforce criminal penalties for unlawful solicitation." 535 U.S. at 251-252. The Court made that observation not in the context of a transaction for profit, but in discussing permissible ways to address adults who might seduce children. *Ibid.* That principle directly supports Congress's regulatory authority to ban solicitations or promotions of material that, as represented, is unlawful to possess.

b. Non-commercial offers to provide or solicitations to obtain child pornography can also be regulated consistent with the First Amendment because such offers and solicitations, no less than their commercial analogs, contribute to the nationwide market for child pornography and fuel the creation of more child pornography through the abuse of children. Congress can ban such speech as a permissible means of drying up the market for child pornography and thus eliminating a major incentive for its creation.

This Court's decision in *New York* v. *Ferber*, 458 U.S. 747 (1982), recognized that the compelling interest in

suppressing the market for child pornography justifies the imposition of criminal penalties on those who promote that material, for profit or otherwise. That case involved a facial challenge to a New York statute that made it a crime to "promote" non-obscene child pornography and that defined "promote" to mean, *inter alia*, to "sell, give, provide, lend, * * * distribute, * * * present, * * * or advertise, or to offer or agree to do the same." *Id.* at 751 (quoting N.Y. Penal Law § 263.00(5) (McKinney 1980)). This Court rejected that challenge, noting that "the production of pornographic materials is a low-profile, clandestine industry," in which "the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled." 458 U.S. at 759-760. The Court concluded that the legislature was justified in believing that it would be "difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies." *Ibid.* Thus, "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Id.* at 760. The Court upheld the statute even though it covered, *inter alia*, someone who "give[s]" child pornography away or "offer[s]" to do so.

For similar reasons, the Court upheld a criminal ban on the possession and viewing of child pornography in *Osborne* v. *Ohio*, 495 U.S. 103 (1990). That ban was based on the State's desire "to protect the victims of child pornography" by "destroy[ing] the market for the exploitative use of children." *Id.* at 109. The Court observed that, "since the time of [its] decision in *Ferber*,

much of the child pornography market has been driven underground." *Id.* at 110. The Court concluded that the statute was a permissible attempt to "decreas[e] demand" for child pornography and "to stamp out this vice at all levels in the distribution chain." *Ibid.*

Similarly here, an individual who solicits child pornography provides a spur to its creation, whether or not the solicitation includes a promise of payment. Requests for free samples frequently precede sales of pornographic material.[6] Non-commercial solicitations of child pornography also create an incentive for producers of "homemade" child pornography who do not intend to sell their product.[7] Likewise, offers of child pornography fuel the market, whether or not they include a request for payment. Non-commercial offers serve to introduce the product to new consumers and to generate interest. Non-commercial transactions also prompt the wider circulation of already existing child pornography.

Thus, unlike virtual child pornography, which the Court in *Free Speech Coalition* concluded was "not 'intrinsically related' to the sexual abuse of children," 535 U.S. at 250, the offers and solicitations at issue here directly fuel the market for real child pornography. The possibility that some of the material offered may not be correctly described does not prevent the offers from stoking the demand. This fueling of the market results in the very harms to children recognized by this Court

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[6] See *United States* v. *Gnavi*, 474 F.3d 532, 534 (8th Cir. 2007) (defendant responded to an undercover agent's offer of a catalogue of videos containing child pornography by requesting "any sample videos/pics" and stating that "[a]nything would be appreciated").

[7] See *United States* v. *Tagore*, 158 F.3d 1124, 1127 (10th Cir. 1998) (defendant organized a secret chat room to which members submitted "homemade" child pornography).

in *Ferber* and *Osborne*: the sexual exploitation and abuse of children, and the exacerbation of that abuse by the circulation of a permanent record of it. See *Ferber*, 458 U.S. at 758-759; *Osborne*, 495 U.S. at 109-110, 111. Because of the necessity of suppressing the market in order to protect children, such non-commercial offers to transact in illegal material should be held wholly unprotected by the First Amendment. Accordingly, to the extent Section 2252A(a)(3)(B) bans such offers and solicitations, it infringes no First Amendment right.

3. *The imminent-incitement test of* Brandenburg *v.* Ohio *does not apply to regulations of direct offers to provide, or solicitations to receive, illegal contraband*

a. The court of appeals apparently believed that the government could not regulate *non-commercial* solicitation or distribution of, or offers to distribute, illegal contraband except "under the narrow circumstances * * * of immediate incitement." Pet. App. 23a & n.58 (citing, *inter alia*, *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam)). That is incorrect, because the imminent-incitement requirement of *Brandenburg* does not apply to the type of speech at issue here. Section 2252A(a)(3)(B) does not address efforts to advocate viewing child pornography, but only efforts to solicit or provide such contraband.

In *Brandenburg*, a leader of a Ku Klux Klan group was convicted under a state syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform." 395 U.S. at 444-445 (quoting Ohio Rev. Code Ann. § 2923.13). The defendant's conviction was based on two speeches, in one of which he stated, *inter alia*:

"We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken." *Id.* at 446. This Court reversed, holding that a statute that "purports to punish mere advocacy" of illegal action to effect political or industrial reform, and "to forbid, on pain of criminal punishment, assembly with others merely to advocate" such action could not constitutionally be proscribed in the absence of "incitement to imminent lawless action." *Id.* at 448-449.

This Court has since recognized that the legislature may proscribe direct offers to engage in illegal transactions without meeting an imminent-incitement requirement, because such offers involve neither mere advocacy nor the "mere tendency * * * to encourage unlawful acts." *Free Speech Coal.*, 535 U.S. at 253. Advocacy of illegal conduct may be a form of political speech, and the government's authority to restrict such speech comes into play only when it tends to spark an immediate response. Otherwise, the remedy is more speech. But in *Free Speech Coalition*, the Court contrasted the type of speech covered in *Brandenburg* with speech that has a "significantly stronger, more direct connection" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253-254. Such speech simply proposes (or constitutes) a violation of the law. See *Freeman*, 761 F.2d at 551-552 (distinguishing between "abstract generality, remote from advice to commit a specific criminal act" for which *Brandenburg* must be satisfied, and "soliciting or counseling a violation of the law" for which "the First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words used are so close in time and purpose to a sub-

stantive evil as to become part of the ultimate crime itself").

If, as the court of appeals seemed to believe (Pet. App. 23a & n.58), there really were no room under the First Amendment for regulation of non-commercial offers to engage in criminal activity apart from satisfying *Brandenburg*'s imminent-incitement test, virtually all criminal statutes outlawing criminal solicitation would be unconstitutional because they do not impose limits on the immediacy and likelihood of the completed crime, nor do they require a commercial component.[8] As the Fourth Circuit has explained, "to understand the Court [in *Brandenburg*] as addressing itself to speech other than advocacy would be to ascribe to it an intent to revolutionize the criminal law, in a several paragraph *per curiam* opinion, by subjecting prosecutions to the demands of *Brandenburg*'s 'imminence' and 'likelihood' requirements whenever the predicate conduct takes, in whole or in part, the form of speech." *Rice* v. *Paladin Enters., Inc.*, 128 F.3d 233, 265 (1997), cert. denied, 523 U.S. 1074 (1998). Solicitation can be prohibited even in circumstances in which the acceptance that is a prerequisite for the underlying crime is quite unlikely. Indeed, a person can commit criminal solicitation where the proposed crime is not only unlikely, but also factually im-

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[8] See, *e.g.*, Model Penal Code § 5.02(1) (1985) ("A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime."); 18 U.S.C. 373(a) (imposing criminal liability on any person who "solicits, commands, induces, or otherwise endeavors to persuade" another to commit a felony crime of violence "with intent that another person engage in conduct constituting" the crime).

possible. See, *e.g.*, 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.1(d), at 201 (2d ed. 2003).

b. The court of appeals also believed (Pet. App. 22a-23a & n.58) that *Brandenburg* applied because it apparently concluded that Congress's inclusion of the term "promotes" in the statutory prohibition reaches advocacy. That is wrong because whatever the scope of that term standing alone, the use of "promotes" in Section 2252A(a)(3)(B) does not sweep in the type of speech covered in *Brandenburg*.

Under the interpretive canon *noscitur a sociis*, "[a] word is known by the company it keeps." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006); see *Dole* v. *United Steelworkers*, 494 U.S. 26, 36 (1990) ("[W]ords grouped in a list should be given related meaning."). Here, the surrounding terms—"advertises, * * * presents, distributes, [and] solicits"—when used in conjunction with an item, encompass only direct offers to send, or attempts to obtain, real or purported contraband. See *Webster's Third New International Dictionary* 31 (1961) (*Webster's Third*) (to "advertise" an item means "to call public attention to [it] esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize"); *id.* at 1793 (to "present" an item means "to lay or put before a person for acceptance: offer as a gift"); *id.* at 660 (to "distribute" means "to give out or deliver" or "to market (a commodity) under a franchise"); *id.* at 2169 (to "solicit" means "to endeavor to obtain by asking or pleading"). In context, the term "promotes" is most naturally read as having a comparable meaning.

When "promote" is used in conjunction with a product, it commonly means "to present (merchandise) for public acceptance through advertising and publicity." *Webster's Third* 1815; accord *Random House Dic-*

tionary of the English Language 1548 (2d ed. 1987) (to "promote" means "to encourage the sales, acceptance, etc., of (a product), esp. through advertising or other publicity"). That is plainly its meaning in Section 2252A(a)(3)(B). To read "promote" in this context to encompass abstract advocacy would improperly "ascrib[e] to one word a meaning so broad that it is inconsistent with its accompanying words." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995).

In addition, to the extent that there is any doubt on this score, the narrower interpretation of "promotes" must be adopted to avoid any constitutional concerns. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988) ("It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."); *Ferber*, 458 U.S. at 769 n.24 ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.") (citing, *inter alia*, *Crowell* v. *Benson*, 285 U.S. 22, 62-63 (1932)). The term "promotes" has a well-known pedigree in laws aimed at eliminating the market for child pornography, see *Ferber*, 458 U.S. at 751, and this Court has never construed it in this context as prohibiting abstract advocacy.

4. Direct proposals to provide or to receive contraband do not gain First Amendment protection simply because the materials are false, fraudulent, or nonexistent

The court of appeals believed that the statute sweeps in protected speech because the statute applies to "pro-

motion, presentation, distribution, and solicitation" of materials, "even when the touted materials are clean or non-existent." Pet. App. 22a. The court expressed concern that "any promoter—be they a braggart, exaggerator, or outright liar—who claims to have illegal child pornography materials" violates Section 2252A(a)(3)(B), "even if what he or she actually has is a video of 'Our Gang,' a dirty handkerchief, or an empty pocket." *Id.* at 22a-23a.

Section 2252A(a)(3)(B) does capture liars, braggarts, and exaggerators, but only if they directly offer to provide material that is purported to be illegal child pornography.[9] That poses no constitutional problem because such statements, even if not backed up by real (or any) illegal child pornography, are not entitled to First Amendment protection.

a. The liars, braggarts, and exaggerators who fall within the scope of Section 2252A(a)(3)(B) are not engaged in protected speech. False or deceptive statements of fact have "no constitutional value," and "belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky* v.

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[9] The court of appeals' concern with materials that purport to be child pornography, but that in fact are not, has salience only for the offering side of the transaction, and not for solicitations. While it might be theoretically possible to solicit material that purports to be child pornography, in reality, solicitations will be for child pornography. The statute, of course, precludes a defense based on a claim that the material actually received was not real child pornography, even though it was marketed as such.

New Hampshire, 315 U.S. 568, 572 (1942)); see *Herbert* v. *Lando*, 441 U.S. 153, 171 (1979). "Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Gertz*, 418 U.S. at 340 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Indeed, knowingly false claims by liars, braggarts, and exaggerators offering or seeking real child pornography are proscribable even under the speech-protective standard of *New York Times* v. *Sullivan*. See 376 U.S. at 279-280; see also *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964).

The court of appeals was thus mistaken in believing that the government may regulate false or deceptive speech only in a traditional commercial setting involving a lawful product. Pet. App. 21a. This Court's precedents make clear that "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Virginia Pharmacy*, 425 U.S. at 771. There is no First Amendment value in speech that peddles innocent or nonexistent material as illegal child pornography.

b. Efforts to solicit real child pornography, especially if the solicitations are left unfulfilled, create an incentive for greater production of real child pornography by making clear that a ready market awaits.[10] Congress may regulate the demand side of this illegal market by prohibiting child-pornography solicitations, even if the material ultimately supplied is not actual child pornography, in an effort to "stamp out this vice at all

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[10] See *United States* v. *Meiners*, No. 06-30389, 2007 WL 1462239, at *2 (9th Cir. May 21, 2007) (per curiam) ("By advertising his desire to receive and trade child pornography, [the defendant] directly encouraged the production and distribution of material that is created by abusing children.").

levels in the distribution chain." *Osborne*, 495 U.S. at 110. Similarly, offers to provide a "purported" illegal product directly stimulate the market for that product, even if the supplier has only counterfeit goods or does not intend to deliver anything. Left unpunished and allowed to proliferate, false offers to provide contraband also consume valuable law enforcement resources, making it easier for genuine traffickers to market their products. Indeed, it would be strange to hold that the First Amendment permits Congress to prohibit "a want ad proposing a sale of narcotics or soliciting prostitutes," *Pittsburgh Press*, 413 U.S. at 388, but disables Congress from prohibiting the same want ad if the speaker in fact possesses only counterfeit narcotics, or does not actually intend to hire a prostitute.

Congress made express legislative findings about the need to prohibit pandering and solicitation as a key element of its effort to eliminate the market in child pornography. In contrast to the legislative findings in *Free Speech Coalition*, which this Court noted were "silent on the evils posed by images simply pandered" as child pornography, 535 U.S. at 257, the legislative findings here emphasize the government's compelling interest in "dry[ing] up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). Congress explained that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Conf. Rep. No. 66, *supra*, at 62.

5. Any mistaken speech captured by Section 2252A(a)(3)(B), properly construed, is wholly unprotected

The court of appeals found Section 2252A(a)(3)(B) "particularly objectionable" because it believed that the provision would ensnare those whose offers or solicitations "reflect[] the deluded belief" that the materials offered or sought contain real child pornography. Pet. App. 23a-24a. It thus concluded that the statute criminalizes speech "reflecting the deluded belief" that "nonpornographic depictions of children[,] such as commercially produced images of children in clothing catalogs, television, cinema, newspapers, and magazines," are sexually arousing. *Id.* at 25a. The court perceived this aspect of the statute as tantamount to criminalizing "thoughts conjured up by those legal materials." *Id.* at 26a. That concern is unfounded, and it springs from the court's fundamental misinterpretation of Section 2252A(a)(3)(B), which gave the provision a broader reading than its language warrants. Although the statute, properly construed, does capture some speech by mistaken actors, that speech is not constitutionally protected.

a. Contrary to the court of appeals' conclusion that "the 'reflects the belief' portion of the statute has no intent requirement," Pet. App. 39a-40a, Section 2252A(a)(3)(B) in fact has both objective and subjective intent components. As to the objective component: to violate Section 2252A(a)(3)(B), a person must advertise, promote, present, distribute, or solicit material "*in a manner* that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains" illegal child pornography. 18

U.S.C. 2252A(a)(3)(B) (emphasis added). The structure of the sentence makes clear that the words "in a manner" modify both subsequent clauses: "that reflects the belief" and "that is intended to cause another to believe." The words "in a manner" thus provide an objective benchmark for both clauses—a reasonable person must conclude from the language and context of the communication (its "manner") either (1) that the speaker has the "belief" that the proposed transaction will involve illegal child pornography, or (2) that the communication is "intended to cause another to believe" that the proposed transaction will involve illegal child pornography.

Further, the statute has two subjective components. First, the statute requires a showing that the speaker had "the belief" or "intended to cause another to believe" that the material was proscribable child pornography. Those are subjective showings that establish that the speaker intended to traffic, or to purport to be trafficking, in real child pornography, regardless of whether he actually had or could have received such materials. See H.R. Conf. Rep. No. 66, *supra*, at 61-62; S. Rep. No. 2, *supra*, at 12.[11]

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[11] In addition, to avoid constitutional doubt, the "reflects the belief" portion of the statute could be construed to apply only where the defendant solicits materials, while the "intended to cause another to believe" portion of the statute could be construed to apply only where the defendant advertises, promotes, presents, or distributes materials. See *American Booksellers Ass'n*, 484 U.S. at 397; *Ferber*, 458 U.S. at 769 n.24. The legislative history suggests that Congress understood the provision to operate in precisely that fashion. See S. Rep. No. 2, *supra*, at 10 (the government "must prove that the defendant specifically believed (as a *buyer*), or intended to cause another to believe (as a *seller*), that the proffered material depicted either: (1) actual children

Second, the statute applies only to statements made "knowingly." 18 U.S.C. 2252A(a)(3). That scienter requirement applies to each element of the pandering offense set forth in subsection (a)(3)(B), including the manner of communication. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (interpreting the word "knowingly" in a child pornography statute to extend beyond the transportation or receipt element to encompass knowledge of "the sexually explicit nature of the material and [of] the age of the performers"). While, as a matter of grammar, the word "knowingly" could be read to apply *only* to the immediately following clause ("advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material"), as in *X-Citement Video*, that limitation of the scienter element could engender unnecessary constitutional concerns. See *id.* at 68-69, 71, 78. The mental element "knowingly" must therefore travel down the statute to encompass knowledge of the "manner" in which material is represented. Thus, as the district court recognized (Pet. App. 65a), to violate the provision, a defendant must know that a reasonable person would interpret his words, in context, as referring to real child pornography, regardless of whether any illegal material is actually available.

b. The court of appeals also erred in construing the statute as imposing criminal liability based merely on the defendant's subjective belief that the materials are sexually arousing. Pet. App. 25a (stating that the "reflects the belief" portion of the statute "shifts the focus" to "the perverted but privately held belief that materials

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engaged in sexually explicit conduct; or (2) sexually explicit conduct involving minors that was obscene") (emphases added).

are lascivious"). It would not be enough for the defendant subjectively to believe that the material is lascivious. Rather, the defendant must offer to transact in material "in a manner that reflects the belief" that the material contains either "(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. 2252A(a)(3)(B)(i) and (ii). Section 2256(2)(A) in turn defines "sexually explicit conduct" for these purposes as actual or simulated sexual intercourse, bestiality, masturbation, sadistic or masochistic abuse, or "lascivious exhibition of the genitals or pubic area of any person." 18 U.S.C. 2256(2)(A)(v) (Supp. IV 2004). The term "lascivious" modifies the phrase "exhibition of the genitals or pubic area." Thus, where liability is predicated on the "lascivious" prong of the definition of "sexually explicit conduct," the manner of the defendant's communication must reflect a belief that the material offered or sought actually depicts a minor engaged in "exhibition of the genitals or pubic area," and that the exhibition is "lascivious." 18 U.S.C. 2256(2)(A)(v).[12]

c. Accordingly, although in some circumstances, Section 2252A(a)(3)(B) may capture communications that reflect the mistaken or "deluded" belief that the material offered or sought is illegal child pornography, liability does not turn strictly on the speaker's personal belief that the material (or purported material) is sexually arousing. Rather, liability attaches only if the

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[12] As the court of appeals recognized, the meaning of "lascivious exhibition" is well-established in the law. Pet. App. 24a n.62. Indeed, in *X-Citement Video*, this Court upheld the same definition in the face of a vagueness and overbreadth challenge. *X-Citement Video*, 513 U.S. at 78-79 (discussing 18 U.S.C. 2256 (1994)).

speaker has advertised, promoted, presented, distributed, or solicited materials "in a manner" that a reasonable jury concludes "reflects the belief" that the materials were real child pornography, as defined by the relevant provisions, and the defendant knew and intended that his speech had that character.

Mistaken speech of this character, no less than intentionally false speech, is wholly unprotected because it fuels the market for child pornography, for the reasons explained above. See pp. 30-31, *supra*. It creates the impression that a supply of or demand for real child pornography exists, and thus leads to the abuse of children. For this reason, the government may ban it.

Moreover, offers to provide or solicitations to receive material under the genuine, but mistaken, belief that the transaction will involve real child pornography may be punished as an inchoate form of an offer to transact in contraband, tantamount to attempt or conspiracy.[13] If it were otherwise, targets in a sting who seek to obtain contraband or illegal services from an undercover agent would be protected by the First Amendment, because the target would be operating under the mistaken belief that the agent will provide him with contraband or illegal services. Thus, anyone who solicits sex, attempts to hire a hit man, or seeks illegal child pornography from an undercover officer would have a First Amendment

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[13] The court of appeals stated, without citation, that "mere talk" cannot constitute a "substantial movement toward completing [a] crime," as required for inchoate offenses under "Supreme Court First Amendment jurisprudence." Pet. App. 36a. It is well-established, however, that words alone may serve as "an act sufficient for criminal liability." 1 LaFave, *supra*, § 6.1(b), at 424. Indeed, some crimes are frequently committed through "mere talk," including inchoate crimes like solicitation and conspiracy. *Ibid.*

defense. Here, for example, respondent sought to trade real child pornography with the undercover agent, on the mistaken belief that the undercover agent would provide such material. Such an attempted illegal transaction, even if based on a mistake, finds no haven in the First Amendment.

6. Section 2252A(a)(3)(B) proscribes no protected speech

As the court of appeals recognized (Pet. App. 16a-18a), Section 2252A(a)(3)(B) "targets only the act of pandering" or soliciting depictions that are, as represented, constitutionally unprotected. There is no per se protection for pandering. Indeed, pandering itself can support the conclusion that materials are constitutionally unprotected. See *Ginzburg* v. *United States*, 383 U.S. 463 (1966). The statute does nothing more than prohibit direct offers to provide, or solicitations to obtain, contraband. Congress unquestionably has the power to proscribe such speech, which has a "proximate link to the crime from which it came." *Free Speech Coal.*, 535 U.S. at 250. Unlike the prohibition of virtual child pornography at issue in *Free Speech Coalition*, for which the Court concluded that any causal link to child abuse was too attenuated, the speech proposing a transaction in illegal child pornography here has a direct link to the market for such horrific and damaging materials, with the repeatedly recognized attendant risk of fueling child abuse.

Section 2252A(a)(3)(B) thus serves the same compelling governmental interests relied on by this Court in *Ferber* and *Osborne*. Congress made express legislative findings that the speech at issue is an integral part of the market for child pornography. As Congress's findings demonstrate, offers and solicitations stimulate the

market for child pornography, thereby resulting in children being abused to produce child pornography to supply the demand for that material.

Congress emphasized that the government has a "compelling interest" in the continued enforceability and effectiveness of its prohibitions against child pornography, § 501(3), 117 Stat. 676, the production of which "results from the abuse of real children by sex offenders." § 501(12), 117 Stat. 678. Congress found that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). Congress further found that *Ferber* had driven child pornography from the shelves of adult bookstores, and concluded that congressional action was necessary in order "to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet." § 501(15), 117 Stat. 678. Respondent's conduct in this case illustrates the type of offers and solicitations Congress sought to capture. See pp. 6-8, *supra*. The First Amendment does not shield such direct offers and solicitations of contraband.

B. Section 2252A(a)(3)(B) Is Not Overbroad In Relation To Its Plainly Legitimate Sweep

Even if Section 2252A(a)(3)(B) reached some actual instances of protected speech, "that assumption would not 'justify prohibiting all enforcement' of the law unless its application to protected speech is substantial, 'not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications.'" *McConnell* v. *FEC*, 540 U.S. 93, 207 (2003) (quoting *Virginia* v.

Hicks, 539 U.S. 113, 119-120 (2003)). Certainly nothing in this record would justify such a conclusion, and the court of appeals did not even undertake the appropriate analysis to quantify and compare the supposed protected applications with the proscribable ones.

A party bringing a facial challenge, even one under the First Amendment, "bears the burden of demonstrating" a statute's unconstitutional overbreadth. *Hicks*, 539 U.S. at 122. To meet that burden, it is not enough to show some overbreadth. Rather, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). This is so because "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law." *Hicks*, 539 U.S. at 119. As this Court has explained, "there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct." *Ibid.* This Court has thus required that "a law's application to protected speech be 'substantial,' * * * relative to the scope of the law's plainly legitimate applications, before applying the 'strong medicine' of overbreadth invalidation." *Id.* at 119-120 (citation omitted).

Respondent did not make the requisite showing "'from the text of [the law] and from actual fact,' that substantial overbreadth exists." See *Hicks*, 539 U.S. at 122 (brackets in original) (citing *New York State Club Ass'n* v. *City of New York*, 487 U.S. 1, 14 (1988)). As for the plainly legitimate sweep of the statute, the court of appeals acknowledged (Pet. App. 21a-22a) that Section 2252A(a)(3)(B) clearly covers substantial quantities of

unprotected speech, including *all* commercial offers or solicitations for illegal child pornography, regardless of whether the offerors actually have any illegal child pornography. *Id.* at 34a. But the court improperly limited the "commercial context" by excluding situations in which child pornography is "exchanged," Pet. App. 29a, 34a, and it provided no explanation why barter should be treated differently for constitutional purposes from sale.[14]

Even if some non-commercial applications of the statute posed constitutional problems, the court of appeals did not attempt to quantify the extent to which these areas of concern might actually exist or, more importantly, how these areas of potential application of the statute compare with the statute's legitimate sweep. Instead, the court's conclusion (Pet. App. 36a) that the statute was overbroad, and therefore facially invalid, turned principally on the court's reliance on a few hypothetical scenarios.

As an initial matter, it is hard to fathom how the types of isolated scenarios given by the court—persons falsely or mistakenly claiming to possess child pornogra-

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[14] Courts have recognized the commercial nature of exchanging or trading in child pornography, holding that such transactions qualify as distributions "for pecuniary gain" within the meaning of U.S. Sentencing Guidelines § 2G2.2, comment. (n.1) (1999). See *United States* v. *Williams*, 253 F.3d 789, 795-796 (4th Cir. 2001); *United States* v. *Laney*, 189 F.3d 954, 961 (9th Cir. 1999); *United States* v. *Black*, 116 F.3d 198, 202-203 (7th Cir.), cert. denied, 522 U.S. 934 (1997). Since 2000, the Guidelines have expressly provided for an enhanced sentence not only where the defendant distributed child pornography "for pecuniary gain," but also where the defendant distributed child pornography "for the receipt, or expectation of receipt, of a thing of value," including "other child pornographic material." Guidelines § 2G2.2, comment. (n.1) (2006); *id.* § 2G2.2(b)(3)(A) and (B).

phy, the possession of which is itself a crime (Pet. App. 22a-26a)—could ever be substantial in comparison with the heartland of conduct prohibited by Section 2252A(a)(3)(B): speech offering or soliciting fully proscribable child pornography. Indeed, it is difficult to imagine how Section 2252A(a)(3)(B)'s prohibition of speech offering or soliciting such illegal material poses any realistic threat to actual instances of protected speech.

Unlike the statutory definitions of child pornography whose implications for mainstream literature and movies depicting teenage sexual activity concerned this Court in *Free Speech Coalition*, 535 U.S. at 247-248, 257, Section 2252A(a)(3)(B) could not ensnare promotions of *Romeo and Juliet* or mainstream movies such as *American Beauty* and *Traffic*. Nor did Congress so intend. As Congress observed, "the producers of movies like *American Beauty* and *Traffic* do not intend for viewers to believe that real children are actually engaging in sexual activity." S. Rep. No. 2, *supra*, at 10 n.6. Accordingly, "[i]n no way could such movie producers satisfy the specific intent required by this provision." *Ibid.*[15]

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[15] The court of appeals expressed concern that "a person offering for sale a copy of Disney's Snow White on false claims that it contains depictions of minors engaged in sexually explicit conduct" would violate the statute. Pet. App. 21a. But that hypothetical, by referring simply to "false claims," ignores what the content of an advertisement would have to contain to be covered by the terms of the statute. If a person did offer *Snow White* in a manner that would fall within the statute —for example, by suggesting that a real little girl is raped in the video —that would and should be captured by the statute. Persons responding to such an offer would be seeking a video of a little girl being raped and, as Congress found, such offers and responses fuel the market for child pornography and result in more children being sexually abused.

In any event, the court's reliance on a few hypothetical scenarios does not substitute for a proper overbreadth analysis. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Overbreadth analysis requires "realistic" threats to protected speech, not imagined ones. *Id.* at 801.[16] The court of appeals did not identify realistic threats here, let alone find them substantial compared to the statute's legitimate scope.

To the extent that Section 2252A(a)(3)(B) sweeps within its ambit protected speech, any such application can be avoided through case-by-case adjudication. *Hicks*, 539 U.S. at 124; *Ferber*, 458 U.S. at 773-774. As this Court recently observed, "[a]s-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1639 (2007) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)). Respondent makes no claim that his conduct is not covered by the statute's terms, and there is no need for the draconian remedy of declar-

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The statute could reach such pandering whether the video actually delivered was Disney's *Snow White* or a blank video.

[16] See, *e.g.*, *Gibson* v. *Mayor & Council of City of Wilmington*, 355 F.3d 215, 226-227 (3d Cir. 2004) (finding the scenarios advanced by the challenger "more than slightly unrealistic" and holding that "the number and weight of permissible applications far outweigh the possible invalid applications, if not in number, then certainly in kind"); *J&B Entm't, Inc.* v. *City of Jackson*, 152 F.3d 362, 366-367 (5th Cir. 1998) (rejecting an overbreadth challenge where the court could "imagine[]" that the public-nudity ordinance would have banned a nude production of *Hair* or a nude reading by novelist John Grisham, but "these examples, in comparison to its legitimate sweep, are not substantial").

ing the statute facially invalid. See *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" (quoting *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion))).

II. SECTION 2252A(a)(3)(B) IS NOT IMPERMISSIBLY VAGUE

The court below also erred in concluding that Section 2252A(a)(3)(B) is impermissibly vague. Pet. App. 37a-42a. To survive a vagueness challenge, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution, however, does not impose "impossible standards of clarity," *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983) (internal quotation marks and citation omitted), nor does it require "mathematical certainty" from statutory language, *Grayned*, 408 U.S. at 110. Instead, a statute is not vague if it is "clear what the [statute] as a whole prohibits." *Ibid.* "[S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill* v. *Colorado*, 530 U.S. 703, 733 (2000) (internal quotation marks and citation omitted). Moreover, in the context of a federal statute, federal courts have a duty, if it is fairly possible, to construe the statute to provide clarity and to avoid unconstitutional vagueness. See, *e.g.*, *X-Citement Video, Inc.*, 513 U.S. at 69; *Dennis* v. *United States*, 341 U.S. 494, 501-502 (1951).

The court of appeals' vagueness concerns stemmed from its misunderstanding of the scope of the statute, particularly the statute's intent requirement. See pp. 32-35, *supra*. Properly construed, the statute is not impermissibly vague. Rather, as the district court concluded, Section 2252A(a)(3)(B) "prohibits exactly what it was intended to prohibit, the pandering in material which is not protected by the First Amendment." Pet. App. 65a. The statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography." *Ibid.* In short, it is not a statute that "simply has *no* core," *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974), but is a statute with a readily understandable and constitutionally unproblematic center.

Significantly, the court of appeals made no attempt to demonstrate that any of its purported vagueness concerns pertained to the conduct of respondent. Nor could respondent plausibly claim that the statute was vague as applied to his own speech. Respondent logged onto a web site dedicated to child pornography using the pseudonym "Twatjuicesucker2004," and sent out a public message stating: "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." He subsequently posted a link that contained illegal child pornography, along with a message announcing that he could do so because he was "FOR REAL." Pet. App. 2a-3a; J.A. 22-23. If this Court rejects respondent's overbreadth challenge, that should be the end of respondent's facial vagueness challenge. A law that does not chill a substantial amount of protected speech should not be facially invalidated on the theory that it

might be vague in some applications, notwithstanding its legitimate, comprehensible core. As this Court has explained, "[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 495; see *Kolender*, 461 U.S. at 358 n.8.[17] Here, respondent had fair notice that his statements fell well within the scope of the prohibition of Section 2252A(a)(3)(B). And the text of the law adequately guides the discretion of law enforcement officers in cases like this.

In any event, the statute is not vague as to other speakers either. In reaching the contrary conclusion, the court of appeals relied on hypothetical examples. Pet. App. 39a-41a. The court posited "an email claiming that the attached photographs depict "little Janie in the bath—hubba, hubba!" *Id.* at 39a. The court erroneously believed that "[s]ince the 'reflects the belief' portion of the statute has no intent requirement, the government establishes a violation with proof of a communication

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[17] A vagueness challenge can be a component of an overbreadth claim because a court considering overbreadth "should evaluate the ambiguous as well as the unambiguous scope of the enactment." *Hoffman Estates*, 455 U.S. at 494 n.6. But the reverse is also true: when a court has concluded that a statute's legitimate applications greatly outnumber any arguably illegitimate ones, marginal vagueness concerns that have no relevance to a particular defendant should not justify total (*i.e.*, facial) invalidation of a statute. Indeed, *Hoffman Estates* indicates that other than the role vagueness concerns may play in the overbreadth analysis, vagueness does not provide for the same exception to third-party standing limitations as the overbreadth doctrine, and respondent has no standing to assert vagueness concerns that may arise in insubstantial numbers at the periphery of the statute to other defendants. Respondent's conduct lay at the clearly prohibited core of the statute, and that is fatal to *his* vagueness claim.

that it deems, with virtually unbounded discretion, to be reflective of perverse thought." *Id.* at 39a-40a. The court also imagined three possible senders of "an email entitled simply 'Good pics of kids in bed'"—"a proud and computer-savvy grandparent," "a chronic forwarder of cute photos with racy tongue-in-cheek subject lines," and "a convicted child molester who hopes to trade for more graphic photos with like-minded recipients." *Id.* at 40a. Because the court of appeals believed that "[t]he pandering provision is devoid of any contextual parameters" and did not provide for any inquiry into the nature of the underlying images, it suggested that all three senders might be subject to prosecution. *Id.* at 40a-41a.

It is not true, however, that Section 2252A(a)(3)(B) is "devoid of any contextual parameters." As explained (see pp. 32-35, *supra*), all elements of the provision —including the "reflects the belief" and "intended to cause another to believe" clauses—include both objective and subjective intent requirements. Those objective and subjective requirements protect against improper applications of the law and give it the requisite clarity.

The court of appeals was thus incorrect in thinking that criminal liability would attach based on the hypothetical email subject line "little Janie in the bath—hubba hubba!" Pet. App. 39a. A reasonable person could not conclude from the language of that email alone that the speaker believes that he is offering illegal child pornography or that the speaker intends his recipients to so conclude. Nothing about the "little Janie" message suggests that the photograph contains an "exhibition of the genitals or pubic area," 18 U.S.C. 2256(2)(A)(v), or that it includes a photograph meeting any of the other relevant definitions of "sexually explicit conduct." 18 U.S.C. 2256(2)(A). Even assuming that the words "in

the bath" indicate that the photograph depicts nudity, it is well-established that nudity alone does not qualify as sexually explicit conduct. See *United States* v. *Amirault*, 173 F.3d 28, 33 (1st Cir. 1999); *United States* v. *Villard*, 885 F.2d 117, 124 (3d Cir. 1989). Furthermore, nothing in the hypothetical suggests that the speaker subjectively understands that a reasonable person would construe his statement as referring to real child pornography, or that the speaker believes or intends to cause others to believe that it is proscribable child pornography. Therefore, without more—such as other emails sent by the speaker giving context to understand who is referred to by "little Janie" and what is meant by "hubba, hubba"—the court of appeals' hypothetical clearly would not be covered by the statute.

Similarly, with respect to the email entitled "Good pics of kids in bed," the email title alone would be insufficient to trigger coverage under the statute. And nothing about the additional context hypothesized by the court of appeals with respect to the grandparent or chronic forwarder would ensnare those senders, as there is no indication that either sender actually believes, or intends others to believe, that the "kids" depicted in the photographs are engaged in sexually explicit conduct. Nor could either sender be shown to have known that the message would be understood as referring to illicit child pornography. The third sender (the convicted child molester who intended to exchange prohibited images of child pornography) might fall within the confines of the statute, but it would depend on the rest of the facts of the particular case.

Under this statute, context is key, and as this case demonstrates, context both disposes of clever hypothetical cases and makes clear real-life cases. Here, respon-

dent engaged in his speech in a chat room dedicated explicitly to the trading and discussion of child pornography and child sexual abuse. If the grandparents posted their "Good pics of kids in bed" link in such a room, especially after a "chat" like respondent had with the undercover agent with a user name like respondent's, they could rightfully be prosecuted because the manner of that communication would express an intent that the recipient believe that the pictures are pornographic. But if "Good pics of kids in bed" was merely the subject line of an email that the grandparents sent to their close friends and children, that would clearly fall outside the statutory prohibition. Similarly, if the "pics" were posted on the grandparents' personal website, surrounded by family pictures at Disney World, there would be no evidence of a belief that the pictures were child pornography or that others were intended to believe that they were.

Finally, the court of appeals expressed concern that its hypothetical email titles could subject persons to prosecution regardless of whether the attached photographs were innocuous or "whether *any* photos are attached," Pet. App. 40a, and it suggested that this vests law enforcement with too much discretion, *id.* at 41a. This comment loses sight of the fundamental nature of Section 2252A(a)(3)(B). The statute properly reaches concerted efforts to promote materials as real child pornography even if the image or video actually delivered is innocuous or blank. See pp. 29-31, *supra*. In some cases, an innocuous attachment will be highly relevant evidence. But the focus on prohibiting pandering may have its greatest impact in cases in which the attachment is far from innocuous and clearly appears to be actual child pornography, by eliminating the arduous

task of proving that the attachment is as real as the defendant represented it to be. Congress provided the government with a means to prosecute such offers and solicitations, regardless of whether the government can prove that such material is in fact real child pornography or that it even exists, precisely to suppress the child-pornography market that such offers and solicitations fuel.

As both the court of appeals (Pet. App. 17a) and the district court recognized (*id.* at 55a-56a, 67a-68a), Congress made specific legislative findings. In those statutory findings, Congress emphasized the harm to real children that flows from the proliferation of the market for child pornography and that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Pub. L. No. 108-21, § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760). In addition, Congress found that, "[i]n the absence of Congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse," as "the mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution." § 501(13), 117 Stat. 678.

Congress gave prosecutors a variety of tools to achieve its aim, making clear that efforts to stimulate, feed, or capitalize on a market for what purports to be child pornography deserve no sanctuary. Although other provisions address aspects of the problem, see, *e.g.*, 18 U.S.C. 1466A (Supp. IV 2004), 2251(d)(1)(A)

(Supp. IV 2004), this provision is applicable where—as Congress expressly found was a significant issue, see § 501(7)-(14), 117 Stat. 677-678—the government cannot prove that the materials depict actual children.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. The First Amendment to the United States Constitution provides, in part, that "Congress shall make no law * * * abridging the freedom of speech."

2. The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall * * * be deprived of life, liberty, or property, without due process of law."

3. 18 U.S.C. 2252A (2000 & Supp. IV 2004) provides:

Certain activities relating to material constituting or containing child pornography

(a) Any person who—

(1) knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography;

(2) knowingly receives or distributes—

(A) any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(B) any material that contains child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(3) knowingly—

(A) reproduces any child pornography for distribution through the mails, or in interstate or

foreign commerce by any means, including by computer; or

(B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

(4) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly sells or possesses with the intent to sell any child pornography; or

(B) knowingly sells or possesses with the intent to sell any child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer;

(5) either—

(A) in the special maritime and territorial jurisdiction of the United States, or on any land or building owned by, leased to, or otherwise used by or under the control of the United States Government, or in the Indian country (as defined in section 1151), knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography; or

(B) knowingly possesses any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in interstate or foreign commerce by any means, including by computer; or

(6) knowingly distributes, offers, sends, or provides to a minor any visual depiction, including any photograph, film, video, picture, or computer generated image or picture, whether made or produced by electronic, mechanical, or other means, where such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct—

(A) that has been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer;

(B) that was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer; or

(C) which distribution, offer, sending, or provision is accomplished using the mails or by transmitting or causing to be transmitted any wire communication in interstate or foreign commerce, including by computer,

for purposes of inducing or persuading a minor to participate in any activity that is illegal.[1]

shall be punished as provided in subsection (b).

(b) (1) Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than 5 years and not more than 20 years, but, if such person has a prior conviction under this chapter, chapter 71, chapter 109A, chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 15 years nor more than 40 years.

(2) Whoever violates, or attempts or conspires to violate, subsection (a)(5) shall be fined under this title or imprisoned not more than 10 years, or both, but, if such

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[1] So in original.

person has a prior conviction under this chapter, chapter 71, chapter 109A, or chapter 117, or under section 920 of title 10 (article 120 of the Uniform Code of Military Justice), or under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward, or the production, possession, receipt, mailing, sale, distribution, shipment, or transportation of child pornography, such person shall be fined under this title and imprisoned for not less than 10 years nor more than 20 years.

(c) It shall be an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) that—

(1)(A) the alleged child pornography was produced using an actual person or persons engaging in sexually explicit conduct; and

(B) each such person was an adult at the time the material was produced; or

(2) the alleged child pornography was not produced using any actual minor or minors.

No affirmative defense under subsection (c)(2) shall be available in any prosecution that involves child pornography as described in section 2256(8)(C). A defendant may not assert an affirmative defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) unless, within the time provided for filing pretrial motions or at such time prior to trial as the judge may direct, but in no event later than 10 days before the commencement of the trial, the defendant provides the court and the United States with notice of the intent to assert such defense and the substance of any expert or other

specialized testimony or evidence upon which the defendant intends to rely. If the defendant fails to comply with this subsection, the court shall, absent a finding of extraordinary circumstances that prevented timely compliance, prohibit the defendant from asserting such defense to a charge of violating paragraph (1), (2), (3)(A), (4), or (5) of subsection (a) or presenting any evidence for which the defendant has failed to provide proper and timely notice.

(d) AFFIRMATIVE DEFENSE.—It shall be an affirmative defense to a charge of violating subsection (a)(5) that the defendant—

(1) possessed less than three images of child pornography; and

(2) promptly and in good faith, and without retaining or allowing any person, other than a law enforcement agency, to access any image or copy thereof—

(A) took reasonable steps to destroy each such image; or

(B) reported the matter to a law enforcement agency and afforded that agency access to each such image.

(e) ADMISSIBILITY OF EVIDENCE.—On motion of the government, in any prosecution under this chapter or section 1466A, except for good cause shown, the name, address, social security number, or other nonphysical identifying information, other than the age or approximate age, of any minor who is depicted in any child pornography shall not be admissible and may be redacted from any otherwise admissible evidence, and the jury

shall be instructed, upon request of the United States, that it can draw no inference from the absence of such evidence in deciding whether the child pornography depicts an actual minor.

(f) CIVIL REMEDIES.—

(1) IN GENERAL.—Any person aggrieved by reason of the conduct prohibited under subsection (a) or (b) or section 1466A may commence a civil action for the relief set forth in paragraph (2).

(2) RELIEF.—In any action commenced in accordance with paragraph (1), the court may award appropriate relief, including—

(A) temporary, preliminary, or permanent injunctive relief;

(B) compensatory and punitive damages; and

(C) the costs of the civil action and reasonable fees for attorneys and expert witnesses.

4. 18 U.S.C. 2256 (2000 & Supp. IV 2004) provides:

Definitions for chapter

For the purposes of this chapter, the term—

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated—

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the genitals or pubic area of any person;

(B) For purposes of subsection 8(B)[1] of this section, "sexually explicit conduct" means—

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the genitals or pubic area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

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[1] So in original. Probably should be "(8)(B)".

(5) "visual depiction" includes undeveloped film and videotape, and data stored on computer disk or by electronic means which is capable of conversion into a visual image;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"—

(A) means a person—

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

5. Pub. L. No. 108-21, Tit. V, § 501, 117 Stat. 676 (Apr. 30, 2003), provided:

Congress finds the following:

(1) Obscenity and child pornography are not entitled to protection under the First Amendment under Miller v. California, 413 U.S. 15 (1973) (obscenity), or New York v. Ferber, 458 U.S. 747 (1982) (child pornography) and thus may be prohibited.

(2) The Government has a compelling state interest in protecting children from those who sexually exploit them, including both child molesters and child pornographers. "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," New York v. Ferber, 458 U.S. 747, 757 (1982), and this interest extends to stamping out the vice of child pornography at all levels in the distribution chain. Osborne v. Ohio, 495 U.S. 103, 110 (1990).

(3) The Government thus has a compelling interest in ensuring that the criminal prohibitions against child pornography remain enforceable and effective. "The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." Ferber, 458 U.S. at 760.

(4) In 1982, when the Supreme Court decided Ferber, the technology did not exist to—

(A) computer generate depictions of children that are indistinguishable from depictions of real children;

(B) use parts of images of real children to create a composite image that is unidentifiable as a particular child and in a way that prevents even an expert from concluding that parts of images of real children were used; or

(C) disguise pictures of real children being abused by making the image look computer-generated.

(5) Evidence submitted to the Congress, including from the National Center for Missing and Exploited Children, demonstrates that technology already exists to disguise depictions of real children to make them unidentifiable and to make depictions of real children appear computer-generated. The technology will soon exist, if it does not already, to computer generate realistic images of children.

(6) The vast majority of child pornography prosecutions today involve images contained on computer hard drives, computer disks, and/or related media.

(7) There is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children. Nevertheless, technological advances since Ferber have led many criminal defendants to suggest that the images of child pornography they possess are not those of real children, insisting that the government prove beyond a reasonable doubt that the images are not computer-gen-

erated. Such challenges increased significantly after the decision in Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002).

(8) Child pornography circulating on the Internet has, by definition, been digitally uploaded or scanned into computers and has been transferred over the Internet, often in different file formats, from trafficker to trafficker. An image seized from a collector of child pornography is rarely a first-generation product, and the retransmission of images can alter the image so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child. If the original image has been scanned from a paper version into a digital format, this task can be even harder since proper forensic assessment may depend on the quality of the image scanned and the tools used to scan it.

(9) The impact of the Free Speech Coalition decision on the Government's ability to prosecute child pornography offenders is already evident. The Ninth Circuit has seen a significant adverse effect on prosecutions since the 1999 Ninth Circuit Court of Appeals decision in Free Speech Coalition. After that decision, prosecutions generally have been brought in the Ninth Circuit only in the most clear-cut cases in which the government can specifically identify the child in the depiction or otherwise identify the origin of the image. This is a fraction of meritorious child pornography cases. The National Center for Missing and Exploited Children testified that, in light of the Supreme Court's affirmation of the Ninth Circuit decision, prosecutors in various parts of the country have expressed concern about the continued

viability of previously indicted cases as well as declined potentially meritorious prosecutions.

(10) Since the Supreme Court's decision in Free Speech Coalition, defendants in child pornography cases have almost universally raised the contention that the images in question could be virtual, thereby requiring the government, in nearly every child pornography prosecution, to find proof that the child is real. Some of these defense efforts have already been successful. In addition, the number of prosecutions being brought has been significantly and adversely affected as the resources required to be dedicated to each child pornography case now are significantly higher than ever before.

(11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is—and for the foreseeable future will remain—prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

(12) Child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of

real children or the practice of visually recording that abuse.

(13) In the absence of congressional action, the difficulties in enforcing the child pornography laws will continue to grow increasingly worse. The mere prospect that the technology exists to create composite or computer-generated depictions that are indistinguishable from depictions of real children will allow defendants who possess images of real children to escape prosecution; for it threatens to create a reasonable doubt in every case of computer images even when a real child was abused. This threatens to render child pornography laws that protect real children unenforceable. Moreover, imposing an additional requirement that the Government prove beyond a reasonable doubt that the defendant knew that the image was in fact a real child—as some courts have done—threatens to result in the de facto legalization of the possession, receipt, and distribution of child pornography for all except the original producers of the material.

(14) To avoid this grave threat to the Government's unquestioned compelling interest in effective enforcement of the child pornography laws that protect real children, a statute must be adopted that prohibits a narrowly-defined subcategory of images.

(15) The Supreme Court's 1982 Ferber v. New York decision holding that child pornography was not protected drove child pornography off the shelves of adult bookstores. Congressional action is necessary now to ensure that open and notorious trafficking in such materials does not reappear, and even increase, on the Internet.

13

No. 06-694

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

The question presented is whether Title 18 U.S.C. Section 2252A(a)(3)(B) is overbroad, impermissibly vague and as such facially unconstitutional.

Title 18 U.S.C. Section 2252A(a)(3)(B) prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing] or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material," is illegal child pornography.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 444 F.3d 1286. The opinion and order of the district court is unreported.

STATEMENT

The Respondent, Michael Williams, was the defendant in the district court and will be referred to as "Mr. Williams." The United States of America will be referred to as "the Petitioner."

Mr. Williams is incarcerated in the Federal Bureau of Prisons.

On May 13, 2004, Mr. Williams was charged in a two count indictment with promoting and distributing child pornography in violation of Title 18 U.S.C. § 2252A(a)(3)(B) and (b)(1) (Count I) and with possession of child pornography in violation of Title 18 U.S.C. § 2256(8)(A) and (B) (Count II).

On July 14, 2004, Mr. Williams moved to dismiss Count I of the indictment on the grounds that the applicable statute was unconstitutionally vague and overbroad. That motion was orally denied by the district court on July 19, 2004. A written order was subsequently filed on August 20, 2004.

On July 19, 2004, pursuant to a written plea agreement, Mr. Williams pled guilty to Counts I and II of the indictment. Mr. Williams, however, specifically preserved his right to appeal the order denying his motion to dismiss Count I of the indictment.

On September 22, 2004, the district court sentenced Mr. Williams to sixty (60) months of imprisonment as to Counts I and II, to run concurrently, followed by a term of supervised release for two (2) years and a $200.00 special assessment fee.

STATEMENT OF THE FACTS

On April 26, 2004, Special Agent Tim Devine ("SA Devine") was signed onto YIRC on a computer located at the USSS Miami Field Office, Miami, Florida, using the undercover screen name "Lisa_n_Miami" ("LNM"). SA Devine entered a child exploitation chat room entitled "per ten's action uncensored: 1" and observed a public message from the user "Twatjuicesucker2004" (T4) stating, "Dad of toddler has 'good' pic's of her and me for swap for your toddlers pics, or live cam." SA Devine contacted T4 via private message and identified himself as a 30-year-old female mother of a ten-year-old daughter. T4 stated his daughter was two years old and asked LNM to swap photographs of their daughters. T4 stated he had five photographs of his daughter. He also stated he permitted his friends to travel to Key Largo and engage in sexual activity with his daughter, "for a small price: like a case of Icehouse beer or something." T4 stated that LNM could engage in sexual activity with his daughter if LNM would bring her daughter for him to look at. In addition, T4 told LNM he engaged in sexual activity with an 11-month-old child and he had nude photographs of his daughter "in folder on puter."

Utilizing the YIRC file transfer system, T4 sent photographs to LNM. This file contained a photograph

displaying the body of a two- to three-year-old white child lying on a couch wearing a bathing suit. Using the YIRC file transfer system, LNM sent T4 an age regression photograph of a ten- to twelve-year-old female. T4 stated, "I've got hc pictures of me and dau, and other guys eating her out – do you??" Allegedly, hc is internet slang for "hard core."

On this same date, SA Devine accessed the "Photo Album" section of T4's YIRC profile. This section contained five photographs of a white female child approximately one- to two-years-old in various poses. One of the photographs depicted the child with her breast exposed and her pants down just below her waistline. In addition, one other photograph depicted the same child and another female approximately eight to ten years old.

Also on April 26, 2004, SA Devine observed T4 post public messages in the "per ten's action uncensored: 1" chat room accusing LNM of being a police officer and a fake. In response to these postings, SA Devine posted public messages in the "per ten's action uncensored: 1" chat room about T4 being a police officer and a fake. SA Devine then observed T4 post the hyperlink http://fl.pgbriefcase.yahoo.com in the "per ten's action uncensored: 1" chat room. SA Devine accessed the Yahoo briefcase via the http://fl.pgbriefcase.yahoo.com hyperlink. This briefcase contained photographs of nude children, approximately five to fifteen years old, displaying their genitals and/or engaged in sexual activity.

On April 27, 2004, SA Devine served a subpoena on Yahoo Internet Services for all customer information, including e-mail address and Internet Protocol (IP) report, related to the T4 username. On April 24, 2004, a Yahoo

Internet Services representative stated that the T4 username was assigned to e-mail address Twatjuicesucker2004 @Yahoo.com. The Yahoo representative also stated that "Twatjuicesucker2004@Yahoo.com" was accessed from IP addresses 12.77.240.152 on April 25, 2004 at 15:47:49 hours, 12.77.240.16 on April 22, 2004 at 20:06:57 hours, 12.77.238.168 at 19:49:37 hours. SA Devine conducted a "SamSpade.com" online inquiry for the above IP addresses. This inquiry revealed that these IP addresses were assigned to AT&T WorldNet Services.

On April 29, 2004, the U.S. Attorney's Office served a subpoena on AT&T WorldNet Services for all customer and billing information, including Automatic Numeric Identification (ANI) information for the above mentioned IP addresses. On the this same date, AT&T WorldNet Services Investigation Department stated that the above IP addresses were assigned to Michael Williams, 34 Avenue A, Key Largo, Florida. AT&T WorldNet Services also indicated that the Williams' AT&T e-mail address was "Miamimike50@Worldnet.AT&T.net" and Visa account number 4313 0340 9638 6312 was billed for Williams' Internet service. In addition, AT&T WorldNet Services stated the ANI for these IP addresses was (305) 451-3216.

Inquiries conducted through an online Autotrack and the Florida Department of Highway Safety and Motor Vehicles revealed an address of 34 Avenue A, Key Largo, Florida and Florida driver's license number W452-554-48-381-0. In addition, SA Devine conducted an online "Primeris Phone Finder" inquiry for telephone number (305) 451-3216. This inquiry revealed the above telephone number was assigned to the Key Largo switch or network of BellSouth Telecommunications.

On or about April 29, 2004, special agents of the Miami Electronic Crimes Task Force ("MECTF") sought and obtained a federal search warrant for 34 Avenue A, Key Largo, Florida and any computers located therein. They executed the search warrant on April 30, 2004. Inside the trailer, agents found two computers containing a total of three hard drives. On the computers examined, agents found approximately 20-25 images depicting children under the age of 18 engaged in various forms of sexual activity. However, notably, none of the images were of Mr. Williams' underaged daughter although earlier he described her as his "toddler." As such, with regards to Mr. Williams' prior statement, "I've got hc pictures of me and dau, an other guys eating her out, – do you?" Accordingly, Mr. Williams was falsely advertising the type of images he described and claimed to possess. On April 30, 2004, Mr. Williams was arrested and taken into custody.

SUMMARY OF ARGUMENT

The language of the Section is unconstitutionally vague and overboard for several reasons:

i). The pandered child pornography need only be purported to fall under the prohibition of the Section such that the promotional speech is criminalized when the touted materials are clean or do not even exist.

ii). The non-commercial, non-inciteful promotion of illegal child pornography, even if repugnant, is protected speech under the First Amendment. No regard is given to the actual nature or even existence of the underlying material and as such, liability can be established based solely on speech reflecting the mistaken belief that real

children are depicted in legal child erotica, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.

iii). The Section criminalizes speech that "reflects the belief" that materials constitute obscene synthetic or "real" child pornography. Because no regard is given to the actual nature or even the existence of the underlying material, liability can be established based purely on promotional speech reflecting the deluded belief that real children are depicted in legal child erotic, or on promotional or solicitous speech reflecting that an individual finds certain depictions of children lascivious.

iv). The Section fails to define the core phrases "reflects the belief" and "cause another to believe," thereby allowing law enforcement officers unfettered discretion in applying and enforcing the law.

The Section was the product of Congress's attempt to remedy the constitutionally fatal language in the pandered materials provision previously struck down by this Court in *Ashcroft v. Free Speech Coalition,* 535 U.S. 234 (2002). But Congress still fell short of the mandates of the First Amendment and *Free Speech Coalition* because the words of the (new) Section: "reflects the belief, or that is intended to cause another to believe" are as overbroad and vague as the words "appears to be" and "conveys the impression of . . . " in *Free Speech Coalition.*

ARGUMENT: CONGRESS'S PROHIBITION OF OFFERING OR SOLICITING WHAT PURPORTS TO BE UNPROTECTED CHILD PORNOGRAPHY IS UNCONSTITUTIONAL:

While Congress has the power to proscribe offers or solicitations to transact in illegal narcotics or other contraband, including misleading offers of material purported to be contraband (App. Br. at p. 15), the language crafted by Congress in 18 U.S.C. § 2252A(a)(3)(B)[1] falls short of this Court's jurisprudence on overbreadth and vagueness. The Section is overbroad because it is easily capable of covering protected speech (whether commercial or non-commercial). The Section is also vague because it violates the Due Process Clause by using the words "in a manner that reflects the belief, or that is intended to cause another to believe" do not give fair warning of the prohibitions of the Section. Furthermore, those words do not adequately guide the discretion of law enforcement in the application of the Section to the conduct of citizens exercising not just any right, but rather the core value of our federal constitution – the First Amendment right to freedom of speech and expression.

I. SECTION 2252A(a)(3)(B) CAPTURES PROTECTED SPEECH AND IS OVERBROAD

The Section's plain language bans the communication of beliefs about constitutionally-protected material and is unconstitutionally overbroad because it suppresses speech and beliefs that are protected by the First Amendment in an impermissible way. The Section directly contravenes

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[1] Hereafter referred to as "the Section."

the fundamental principle that "[sexually-explicit] speech that is neither obscene nor the product of sexual abuse [of a real minor] retains protection of the First Amendment." *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 251 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 764-65 (1982)).

Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression. *Massachusetts v. Oakes*, 491 U.S. 576 (1989). The doctrine of overbreadth derives from the recognition that an unconstitutional restriction may deter protected speech by parties not before the court and thereby escape judicial review. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In order to prevail on a facial attack on the constitutionality of a statute on grounds of overbreadth, the challenger must show either that every application of the statute creates impermissible risk of suppression of ideas, or that the statute is "substantially" overbroad, which requires the court to find a realistic danger that the statute itself will significantly compromise recognized First Amendment protection of parties not before the court. *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

Petitioner argues that the First Amendment allows the prohibition of commercialized, truthful advertising of an illegal product and commercialized false advertising of any product. However, the Section is not limited to either form of commercial exploitation and still sweeps in non-commercial speech. Thus, the content-based restriction of the Section is subject to strict scrutiny, determining whether it represents the least restrictive means to advance

the government's compelling interest, or, contrarily, instead sweeps in a substantial amount of protected speech. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000). The Section could easily have been drafted to advance the government's interest without sweeping in non-commercial speech.

Petitioner then argues that the Section does not capture protected speech, but that even if it does, it is not overbroad because it does not do so in a substantial way. (App. Br. at p. 17) Petitioner is incorrect for several reasons. The Section captures protected speech simply because a speaker can offer or solicit, without any intended benefit (trade, barter, sale, or money) materials, which are legal, and still be arrested for failing to use sufficiently descriptive words to identify the materials he or she is offering or soliciting. Also, under the Section, the speaker's criminality does not depend upon his or her intent, but rather on what the speaker's audience believes the speaker is talking about, even if that belief is deluded. Last, the Section criminalizes protected thought and expression – repugnant as it may be.

Moreover, the Section can be overboard even if it does not capture protected speech in a substantial way, but if every application of the Section creates an impermissible risk of suppression of ideas. The Section creates significant risk of suppression of ideas because the only way for a person to avoid a possible violation of the Section, due to the confusing, ambiguous words of same, is more prudent to guard silence than to express one's ideas. Simply put, why say anything to another person, which, if albeit mistakenly understood by such person, constitutes the speaker's desire to offer or solicit real or purported illegal child pornography, can land the speaker in jail with the

permanent brand on the speaker's head that he/she is a pedophile?

A. Section 2252A(a)(3)(B) reaches constitutionally protected speech

1. Offers or solicitations to sell, buy, or barter contraband – whether true or false – can be protected by the First Amendment

Petitioner only speaks of the Section as a pandering statute. The word pandering appears nowhere in the Section which, indeed, covers speech much broader than speech only involving "pandering." Rather, the Section uses, without any clear definition, the following words: "advertises," "promotes," "presents," "distributes" and "solicits." The traditional definitions of these words do not require an erotic expression to be made in relation to any "commercial" transaction. Thus, the Section touches protective speech.

Petitioner argues that there is absolutely no First Amendment protection on any offer or solicitation to sell, buy, or barter contraband whether the offer is true or false. (App. Br. at p. 17), citing *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484 (1996). Petitioner is wrong for several reasons. First, under the Section, the materials might actually be clean or non-existent. Second, what makes the speaker's words criminal (or otherwise) is not the speaker's intent behind the words chosen, but rather, the belief or speculation of his or her audience as to what the speaker seeks to sell, buy or barter, regardless of the speaker's actual intent. Stated differently, the Section does not penalize the mens rea of the speaker but instead criminalizes the speaker by focusing on the mens rea of

the audience. Third, the Section captures protected non-commercial, non-inciteful speech.

The Section, as currently drafted, while appearing to one person to constitute an offer or solicitation to sell, buy or barter contraband – whether true or false – can appear to another person (listening to the same words of the speaker) to be an offer or solicitation to sell, buy, or barter something totally lawful and therefore, protected by the First Amendment. Thus, the Section impermissibly reaches constitutionally protected speech. Under the overbreadth doctrine, a statute that prohibits a substantial amount of constitutionally protected speech is invalid on its face. *Free Speech Coalition*, 535 U.S. 234 at 255 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Therefore, the statute is unconstitutional. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

The Section impermissibly criminalizes a person's desire to brag or lie about what he/she intends to offer or solicit regardless of the legal or illegal nature of the material. The Section also impermissibly criminalizes a mistaken offer or solicitation regarding such illegal materials. For example, if Person A says to Person B: "hey, look at these pictures of young hot babes with no clothes" and Person B believes, albeit mistakenly, that the pictures are child pornography, Person A has violated the Section. Here, the speaker's scienter is not determined based upon the speaker's state of mind. Rather, the speaker's scienter is determined based upon what the speaker's audience believes was the speaker's actual intent – a concept that runs afoul of one of the most basic elements of a crime – that the *offender* intended to commit the crime charged. If the Section is not held unconstitutionally overbroad,

people will be afraid to even talk about child pornography or about any subject whom a third party audience might think is child pornography even if that is not the subject of the conversation.

The Section is overbroad because it captures non-commercial, non-inciteful speech. Person A is having a casual conversation with Person B. Person A enjoys viewing illegal child pornography. Person A asks Person B "would you happen to have any child pornography that I can look at?" Person B says, "No." Person A has violated the Section. All Person A has done was expressed a desire – twisted or sick as the desire might be – to look at illegal child pornography that he/she hopes Person B possesses. There is no commerce to this solicitation and, of course, the request is non-inciteful. This concern becomes magnified because of how law enforcement can impermissibly target individuals in "sting" operations. Law enforcement could post an advertisement targeting potential purchasers for illegal child pornography but using non-specific words in the marketing language. An individual, believing he or she is purchasing legal pornography, could easily be lured into a "child pornography trap."

2. Non-commercial efforts to solicit, distribute, or offer to distribute illegal contraband are protected by the First Amendment

Since the pandering provision of the Prosecutorial Remedies and Other Tools to End Exploitation Children Act of 2003 No. 108-21, 117 Stat. 676 (PROTECT Act) is not limited to commercial speech but also extends to non-commercial promotion, presentation, distribution, and solicitation, the content based restriction is governed by a "strict scrutiny" standard.

Petitioner argues that the First Amendment does not protect a non-commercial effort to solicit, distribute or offer to distribute illegal contraband. *Lorrillard Tobacco Co. v. Reilly*, 533 U.S. 525, 579 (2001) (App. Br. at p. 19). Petitioner further relies on *Pittsburg Press Co. v Pittsburg Commissions on Human Relations*, 413 U.S. 376 (1973) (recognizing that a newspaper advertisement captioned "narcotics for sale" and "prostitutes wanted" did not receive First Amendment protection). However, the ad in *Pittsburg Press Co.* involved unambiguous words that were clearly involved in a commercial setting. We note that the issue is not whether the speech in *Williams v. United States*, 127 S. Ct. 3042 (2007) was commercial or non-commercial, but whether the Section, on its face is unconstitutionally overbroad and unconstitutionally vague.

The cases Petitioner relies upon do not address situations where non-commercial speech could be protected. For example, if Person A asks Person B to provide Person A with illegal child pornography, regardless of what Person B says, Person A can be arrested. In a case where Person B has no materials to offer, there can be no legislative concern that Person A's appetite can be whet because Person B's turndown can have two opposite affects on Person A, especially if Person B chastises Person A for daring to ask such a question – creating embarrassment to Person A. On the one hand, an argument can be made that the pedophile would become enraged and propelled to satisfy his desire by soliciting his material from another individual. However, a different argument can be made that Person B's criticism had such an impact on Person A causing Person A's desires to be suppressed resulting in Person A conscientiously refraining from soliciting such material ever again. In this latter case, it would seem that

the freedom of expression actually promotes the legislative intent behind the Section.

Subsections (i) and (ii) of the PROTECT Act pandering provision capture what is clearly child pornography both before and after *Free Speech Coalition* was decided whether involving actual or virtual child pornography. However, the PROTECT Act's pandering provision does not criminalize the speech expressed in the underlying materials in Sections (i) and (ii), but rather the speech soliciting and promoting such material, whether or not the material contains child pornography.

The lower court recognized that the government can punish the advertisement or solicitation of an illegal product or activity because neither is protected speech. *Williams,* 444 F.3d at p. 1297 (citing *Virginia State Bd. of Pharmacy,* 425 U.S. at p. 770). The lower court also correctly noted that if that is all the pandering provision stood for, then the government would not have to show that Congress had "narrowly tailored its restriction because neither of these scenarios involve protected speech." *Id.* at p. 1297. However, the Section, as written, addresses not only liability to the offered or solicited material but rather to the ideas and images communicated to the viewer by the representation of what those materials constitute, the First Amendment is necessarily implicated. *Id.* at p. 1297.

3. The imminent-incitement test of *Brandenburg v. Ohio* does apply to regulation of direct offers to provide, or solicitations to receive, illegal contraband

Petitioner argues that the lower court was wrong in its belief that the government could not regulate

non-commercial solicitations, or distribution of, or offers to distribute, illegal contraband except under the narrow circumstances of imminent incitement. (App. Br. at p. 24) citing, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action). Petitioner attempts to distinguish the *Brandenburg* imminent incitement test as not applying to the type of speech at issue under the Section, however, the Section clearly prohibits "any person" to "knowingly . . . promote[s] . . . obscene materials."

The Eleventh Circuit correctly applied the jurisprudence of this Court to the analysis of the government's ability to regulate non-commercial solicitation, or distribution of, or offers to distribute, illegal contraband. Although in *Free Speech Coalition*, the court contrasted the type of speech covered in *Brandenburg* with speech that has a "significantly stronger, more direct connecting" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy," the principals of *Brandenburg* did not change and certainly, *Free Speech Coalition* did not overrule *Brandenburg*.

Petitioner also disagrees with the lower court's conclusion that the term "promote" speech is so dissimilar from the term "advocacy" speech as to render the *Brandenburg* case inapplicable to the instant case. (App. Br. at p. 27). Petitioner's reasoning is grounded in the interpretive canon *Noscitur a sociis*, which is a well-established and useful rule of construction where words are of obscure or doubtful meaning; and then, but only then, its aid may

be sought to remove the obscurity or doubt by reference to the associated words. *Russell Motor Car Co. v. United States*, 261 U.S. 514, 520 (1923). However, rules of statutory construction are only to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful, they have no place, as this Court has many times held, except in the domain of ambiguity. *Id.* at p. 519 (emphasis added), citing to *Hamilton v. Rathbone*, 175 U.S. 414 (1899). Moreover, this Court has said that these rules of statutory construction may not be used to create but only to remove doubt. *Russell Motor Car Co.*, 261 U.S. at 520. Where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in the question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, which construction must be given to it. *Platt v. Union Pacific Railroad Co.*, 99 U.S. 48 (1879).

The application of *Brandenburg* to the Section forces a recognition that non-commercial, non-incitement expressions cannot be criminalized.

4. Direct proposals to provide or to receive contraband enjoy First Amendment protection even if the materials are false, fraudulent or non-existent

Petitioner argues that without regard to false, fraudulent or non-existent materials, there is no First Amendment protection to any direct proposal to provide or to

receive contraband. (App. Br. at p. 29). This conclusion is erroneous because if in fact the touted materials are clean or non-existent, any braggart, exaggerator or outright liar who claims to have illegal child pornography would be subject to arrest. Moreover, there is a fourth category of individuals the Petitioner totally ignores – one who neither has, nor wants to provide or receive, any illegal child pornography material, but who inarticulately offers or solicits material which another listening person believes does constitute illegal child pornography. Here, an innocent speaker simply goes to jail. Thus, Petitioner's reliance on *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974) does not apply because an individual need not be intentionally lying or committing a careless mistake to be subject to arrest. Rather, a person would go to jail for an inability to sufficiently describe what he/she has to provide or he/she wants to receive.

Petitioner argues that the Section does capture liars, braggarts and exaggerators who have no First Amendment protection. (App. Br. at p. 29). This argument turns basic fundamental tenets of law on its head. Every criminal statute requires intent, whether general or specific. Such intent is measured against the subject or alleged offender, not the victim of a personal crime or the offense of the speakers' words. If a person lies, brags or exaggerates about what he/she has to offer, or wants to acquire, there is a total absence of any criminal intent. This is clearly what the lower court was concerned about. Of course, if a person intentionally lies for false advertising, then there are statutes on fraud, false advertising, and other consumer protection statutes that can address that conduct.

5. Even mistaken speech captured by Section 2252A(a)(3)(B), properly construed, is protected

Petitioner admits that the Section "does capture some speech by mistaken actors" (App. Br. at p. 32), but nevertheless argues that such speech is not constitutionally protected. In support of its argument, Petitioner states that the Section has both objective and subjective intent components, that the objective component of intent is addressed by the words "*in a manner* that reflects the belief, or that is intended to cause another to believe that the material or purported material, or contains" illegal child pornography. Petitioner argues that the words "in a manner" is an objective benchmark for both subsequent clauses of the Section and that a reasonable person must conclude the intention (its "manner") by either: 1) that the speaker has the "belief" that the proposed transaction will involve illegal child pornography; or 2) that the communication is "intended to cause another to believe" that the transaction will involve illegal child pornography.

Petitioner then puts its own spin and interpretation on the plain language of the Section to advance its argument, but to a reasonable and ordinary person, the Section does not make clear who the person is that the words "reflects the belief" applies to. Is it to the speaker? Is it to the intended audience? Or is it to an unintended person who simply overhears the speaker's utterance? Because the Section does not define *whose* belief we are talking about; because any of those three categories of individuals could have a "clean" belief of what the speaker is talking about and because criminal liability does not rest on the intent of the speaker but rather the understanding or interpretation of the listener, the Section clearly and

unavoidably captures mistaken, protected speech and is thus overbroad.

Petitioner argues that the Section has two subjective components, one that requires a showing that the speaker had "the belief" or "intended to cause another to believe" that the material was illegal child pornography, and, two, that the Section applies only to statements made "knowingly," (App. Br. pp. 33-34), claiming that the scienter requirement applies to each element of the Section, including the manner of communication, citing *United States v. X-Citement Video Inc.*, 513 U.S. 64, 78 (1994). For the same reasons stated above, the Petitioner is wrong here as well.

Petitioner says the lower court erred in construing the Section as imposing criminal liability based merely on the defendant's subjective belief that the materials are sexually arousing, (App. Br. at p. 34). Petitioner argues against that holding by stating that it is not enough for the defendant subjectively to believe that the material is lascivious, but rather, the defendant must offer to transact a material "in a manner that reflects the belief" that the material contains either: (i) an obscene visual depiction of a minor engaging in explicit conduct; or (ii) a visual depiction of an actual minor engaging in explicit sexual conduct.

The lower court was absolutely correct that the "reflects the belief" portion of the statute made a defendant's criminal liability conditioned upon a third party's belief rather than the speaker's intent.

Alarmingly, Petitioner argues that a mistaken speech – no less than intentional false speech – is wholly unprotected because it fuels the market for child pornography. (App. Br. at p. 36). This frightening position brings to

mind the following example: An elementary school sports coach[2] has pictures of his underage gymnastic students and innocently offers to exchange pictures of his team to a coach[3] from a competing school. The clean-minded coach does not know that this other coach is a closet pedophile. The pedophile coach believes that the pictures he is about to view (from the clean-minded coach) contain illegal child pornography. Clearly, this is protected/clean speech by the clean-minded coach that is advertised, promoted, presented, or distributed "material ... in a manner that reflects the belief" – to the pedophile – that the material is illegal child pornography. The clean coach has violated the Section, and under Petitioner's argument, this is a commercial speech transaction because it is a trade or barter.

6. Section 2252A(a)(3)(B) proscribes protected speech

Petitioner argues that there is no per se protection for pandering and that pandering itself supports the conclusion that the materials are unconstitutionally protected. Citing *Ginzburg v. United States,* 383 U.S. 463 (1966) (App. Br. at p. 37). Petitioner is wrong because the Section, under a host of realistic everyday examples captures protected speech – particularly any non-commercial parlance between citizens who are simply exchanging their thoughts and ideas about child pornography. The Section misses the target and instead wrongfully punishes individuals for the non-inciteful expressions of their

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[2] The "clean-minded coach."

[3] By using, for example, the following words: "Hey, wanna see these hot picks of my girls in a great locker room pose?"

thoughts and beliefs. However repugnant the conversations might be, the government cannot constitutionally suppress a person's belief that simulated depictions of children are real or that innocent depiction of children are salacious. *Williams,* 444 F.3d at 1300.

B. Section 2252A(a)(3)(B) is overbroad in relation to its plain legitimate sweep

In order for a party to successfully challenge a statute on its face for unconstitutional overbreadth, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plain legitimate sweep." *Broadrick,* 413 U.S. at 615.

Petitioner recognizes that the Section "might breach some actual instance of protected speech." (App. Br. at p. 38). Petitioner argues that Congress can enact laws that abridge protected speech if it does not do so in a substantial way (App. Br. at p. 38) citing *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 2007 (2003). The Section substantially encroaches protected speech because there is an infinite number of examples of speech which are protected and can be criminalized via the Section, as currently drafted. Petitioner argues that the lower court's "reliance on a few hypothetical scenarios does not substitute for proper overbreadth analysis" (App. Br. at p. 42). The lower court simply cited a few examples but not a universe of examples under which protected speech would be affected by the application of the Section, as currently drafted.

Petitioner then argues that the Section should not be stricken but actually dealt with on a case-by-case adjudication. *Virginia v. Hicks*, 539 U.S. 113 (2003). Petitioner's

only analysis is that Williams did not make a claim that his conduct was not covered by the Section. (App. Br. at p. 42). And while this Court tries "not to nullify more of a legislator's work than is necessary, . . . " (*Reagan v. Timer, Inc.*, 468 U.S. 641, 652 (1984)), when a statute is as overbroad and vague as the Section, and particularly where it affects First Amendment freedom, the more frustrating remedy is to simply let Congress re-write the statute rather than risk speech freedoms of millions of people across the country every day and then burden witnesses, law enforcement, prosecutors, judges, juries and higher courts with trying to sort out the mess created by the Section on a case by case basis.

II. SECTION 2252A(a)(3)(B) IS IMPERMISSIBLY VAGUE

Petitioner argues that the Section is not impermissibly vague in that the Constitution does not impose "impossible standards of clarity," citing *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) and if the statue is "clear on what the [statute] as a whole prohibits," citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), it is not vague. The Section however has no standard of clarity and even when read as a whole, is unconstitutionally vague.

Laws that are insufficiently clear are void for three reasons: 1) to avoid punishing people for behavior that they could not have known was illegal; 2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and 3) to avoid any chilling effect on the exercise of sensitive First Amendment freedoms. *Grayned*, 408 U.S. at 108-109.

The vagueness of content-based regulations of speech raises special First Amendment concerns because of its obvious chilling effect on free speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1974). As such, reasonable certainty in statutes is more essential than usual when vagueness might induce individuals to forego their First Amendment rights for fear of violating an unclear law. *Scull v. Comp. of Va. Ex-Rel Committee on Law Reform and Racial Activities v. Virginia ex rel. Committee*, 359 U.S. 344 (1959).

Vague laws in any area suffer constitutional infirmity. But when First Amendment rights are involved, this Court looks even more closely at the statute lest, under the guise of regulating conduct that is reachable by the police power, a First Amendment freedom suffers. Because First Amendment freedoms need breathing space to survive, the government may regulate in this area only with narrow specificity. *Gooding, Warden v. Wilson*, 405 U.S. 518 (1972). A stricter standard of permissible statutory vagueness may be applied to a statute having a potential inhibiting effect on speech and the precision of regulation must be the touchstone in an area so closely involving our most precious freedoms. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

To pass constitutional acceptance, a statute challenged as vague must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and provide explicit standards for those who apply it to avoid arbitrary and discriminatory enforcement. *Kolender v. Lawson,* 461 U.S. 352 at 357 (1983). Particular clarity is required when the statute implicates First Amendment rights. *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982).

The particular language of the statute here "in a manner that reflects the belief, or that is intended to cause another to believe" that touted or desired material contains illegal child pornography lacks the heightened level of clarity and precision demanded of criminal statutes by this Court as established in *Village of Hoffman Estates, Inc.*, 455 U.S. at 498. This language is vague and unclear because it lacks no standard or objective measure to educate the public as to what behavior is lawful versus what behavior is unlawful. The proscription allows law enforcement to subjectively determine what speech "reflects the belief or is intended to cause another to believe." This subjective determination gives unacceptable broad discretion to law enforcement officers to define *in their minds* whether a given utterance or writing violates the statute. *See City of Chicago v. Morales*, 527 U.S. 41 (1999).

There is no doubt that Congress can regulate the commercial distribution or solicitation of obscene child pornography and "real child pornography." But the Section intended to proscribe such conduct is, as the lower court held, "unnecessarily muddled by the nebulous 'purported material' and 'reflects the belief, or is intended to cause another to believe'" language of the Section. Because this language fails to convey the contours of its restriction with enough clarity to allow law-abiding persons to conform to its requirements and because such language gives law enforcement an unacceptable level of subjective determination and broad discretion to define what statement or writing constitutes a criminal offense, it is impermissibly vague.

Petitioner notes that federal courts have a duty, if possible, to construe statutes to provide clarity and to avoid unconstitutional vagueness. This, of course, is true.

However, the Section at issue is so fatally vague, it is *incapable* of correction or resurrection. Moreover, federal courts should not engage in legislating or rewriting statutes. Such conduct offends the checks and balances system of our country under the doctrine of a separation of powers of our government.

While federal courts have a duty, if fairly possible, to construe a federal statute to provide clarity and avoid unconstitutional vagueness, *X-Citement Video, Inc.*, 513 U.S. at 64 (1994), such courts must apply the strict scrutiny standard when the challenge implicates the First Amendment.

The lower court did not misunderstand the scope of the Section. (App. Br. p. 44). Rather, it specifically identified the particular vague, and therefore objectionable and unconstitutional language of the Section. *Williams* at 1306-07. The lower court did not have to make an "attempt to demonstrate that any of its purported vagueness concerns pertained to the conduct of the Respondent" (App. Br. p. 44) because its analysis and finding was on the facial validity of the statute, not under an "as applied" standard. The lower court correctly provided examples of its own to simply show how, in a real life setting, how and why the Section is unconstitutionally vague. *Id.* at 1306-07. Contrary to Petitioner's argument, the lower court did recognize that the problem was not necessarily with no actual material being required but rather because the word "purported" material, if described in a manner that depended not upon the state of mind of the speaker but rather on that of the audience, then the Section was unconstitutional.

Brief Amici Curiae of the National Law Center for Children and Families, Stop Child Predators, the Klaaskids Foundation, the Jessica Marie Lundsford Foundation, and the Joyful Child Foundation

The Brief Amici Curiae of the National Law Center for Children and Families, Stop Child Predators, the Klaaskids Foundation, the Jessica Marie Lundsford Foundation, and the Joyful Child Foundation initially argues that the Section was "carefully" drawn. The fact that the Section was carefully drawn does not make it valid or cure the unconstitutional infirmity of the language in the Section.

The brief argues that Congress recognized the need for a pandering section. This may be true. However, the issue is not whether Congress recognized the need for a pandering provision. The issue is whether the language used by Congress and the manner in which the Section is currently drafted, poses constitutional offense to the First Amendment.

The brief next argues that Congress's findings support the Section and those events subsequent the enactment of the Section demonstrate it has been effective. The issue not whether Congress's findings were supported or were later proven to be supported, rather, whether, as drafted, the Section is unconstitutionally overbroad or vague. The brief argues that the Section was narrowly tailored to pandering. The Section was not sufficiently "narrowly tailored" because it is fraught with overbreadth and vagueness problems. The brief argues that the Section does not reach non-commercial speech. It most certainly does, as already demonstrated by various examples. The brief also argues that all offers to transact in such materials are commercial. Not true, as demonstrated by example.

Lastly, the brief argues that even if the Section reaches some protected speech, it is not substantially overbroad. We have already addressed that issue as well. We note that nowhere, do these Amici Curiae even touch upon the constitutional *vagueness* issue.

Suppose Person A is sitting on a bus bench looking at a photo album not visible to another person B sitting on the same bench. Person A says: "Wow, these pictures of young hot babes are very, very, erotic." Person B says: "Can I see them?" Person A says "here take this one, for free, I have two copies of it and it's the best of the bunch." Person C is a plain clothes police officer who thinks that the photo offered by Person A contains child pornography, when, in reality, it is a Baywatch photo of Pamela Anderson and her fellow female lifeguards wearing skimpy red bathing suits on a southern California beach. Person A could be arrested and charged under the Section, yet Person A had no child pornography and no commerce was involved in this clearly non-commercial speech.

Brief Amicus Curiae of the National Legal Foundation

The Brief Amicus Curiae of the National Legal Foundation ("NLF") makes a single argument – that Williams' speech was "commercial" – as defined in *Bloger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983). Respectfully, the NCF's entire brief (and argument) misses the only issue – whether the Section is overbroad and impermissibly vague, and thus *facially* unconstitutional. The issue is not whether the speech in Williams, was commercial. Thus the NLF's brief is not addressed further.

Amici Curiae Brief of the States of Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, Utah, Vermont, Virginia, Washington, and West Virginia

The crux of the States' argument is that the Section is not overbroad because it was designed to focus on the intent of the panderer and not the actual content of the material; "[b]y its terms, the statute applies only where the defendant *intentionally offers* to transact in pornography made with real children." *Amici Brief*, p. 3 (emphasis supplied). The States believe that the Section is necessary because it "allows prosecutors directly to target an offer to transact in illegal child pornography even in cases where the material cannot be located or has been digitally altered, or where a person is expanding the network for child pornography with material that may not otherwise be obscene. *Amici Brief*, p. 4.

There is no doubt that reducing or "drying-up" the market for child pornography is a compelling governmental interest, although, "the government may regulate the content of constitutionally protected speech in order to promote a compelling interest, and it must choose the *least* restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989) (emphasis added).

The States next argue that they themselves have statutes on their books that mirror the Section, thus "underscoring the legitimacy of Congress's concerns about the child pornography," and that "[t]he faulty reasoning of the Eleventh Circuit casts doubt on a number of very

sensible (and constitutional) state statutes. . . ." *See Amici Brief*, p. 7. The disturbing thought for that argument is that we should put the First Amendment on its head because too many states might be holding its feet up in the air. Any statute drafted as a mirror image of the challenged Section, would suffer similar constitutional infirmities as does the Section in dispute here.

The States further argue that the lower court also erred by finding the Section vague, because it "misread the statute and failed to give the key term "knowingly" its proper meaning." *Amici Brief*, p. 3. The States, say that in the Section the word "knowingly" is set apart from the rest of the Section because the word is intended to apply to each element of the crime. The states however, agree, that the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Amici Brief*, p. 21. *See also*, *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135 (W.D. Wash. 2003) (finding that a state statute was void for vagueness under the First Amendment because enforcement would require prosecutor and jury to discern subjective intent of the speaker and the statute lacked reference to objective standards and the statute did not provide a person of ordinary intelligence a reasonable opportunity to know the speech prohibited).

Part I of the States' brief argues that Congress recognized the need to close the network for child pornography, *Amici Brief*, p. 4, and that as currently written, many sound and important state statutes may face the same fate. *Amici Brief*, p. 10.

The reasoning behind the States' brief amounts to the concept, "the end justifies the means." Essentially, it is acceptable to turn the First Amendment on its head because the horrible crime of child pornography is so offensive that constitutional standards for the drafting of language in criminal statutes can simply be ignored. The issue is not whether the proliferation of this "virtual defense" has made prosecution of child pornography crimes more difficult and expensive. The issue is about the constitutional validity of the Section on its face, under overbreadth a vagueness standard. If difficult and/or expensive prosecutions are the justifications to simply surrender the First Amendment, then the war on pandered child pornography is far too high a price to pay. The First Amendment is simply not for trade, not for barter and not for sale. Moreover, if the twenty-seven states, as a result of this Court upholding the Eleventh Circuit's decision in *Williams*, have to re-write their correlating state statutes for fear of future attacks on such statutes – then so be it. Constitutional rights are the roots of this country, particularly, the First Amendment. If Congress or any state needs to rewrite an unconstitutionally overbroad or vague statute, then, writer's cramp should take the back seat to the most precious of our freedoms.

Parts II and III of the States Amici Curiae brief track points and arguments raised by the government and are fully addressed by Mr. Williams elsewhere in his brief in opposition.

Brief Amicus Curiae for the American Center for Law and Justice and Eighteen Members of Congress

This Brief Amicus Curiae starts by arguing that the Section only covers commercial speech because of the pandering nature of the Section, citing *Pinkus v. United States*, 436 U.S. 293, 303 (1978), totally ignoring a plethora of situations where the Section can cover non-commercial or private speech.

Next, the brief argues that the lower court erred in holding that the First Amendment protects misleading statements about the nature or existence of sexually explicit material, citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). This position ignores the Section's application to an innocent mistake and confuses the basic requirement that every criminal statute must have an intent element which cannot be satisfied if the speaker is careless or delusional about the words he or she uses to offer or solicit any material to or from any individual.

The brief then argues the cannon of constitutional avoidance, citing *Blodgett v. Holden*, 275 U.S. 142 (1927). Mr. Williams retorts that there is no way to interpret the words of the Section to avoid the arrest, prosecution and conviction of innocent individuals for simply misusing words to describe a desire to offer or solicit material which might not constitute illegal child pornography.

Lastly, the brief argues that under this Court's commercial speech precedents, the Section poses no threat to the First Amendment. As already argued by Mr. Williams, the Section absolutely offends protected speech under the First Amendment.

Brief Amici Curiae for the Lighted Candle Society and Family Leader Foundation

This brief argues the well intended passage of the Child Pornography Prevention Act of 1966, Pub. L. No. 104-208, 110 Stat. 3009-26 (1996).

The brief argues the importance of punishing "false pandering." Again, the Section does not only cover "false pandering." Rather, it covers mistaken, careless and diluted offers, solicitations, distribution, advertisement and presentment of materials that might be clean or nonexistent.

Next, the brief argues that pandering is largely, if not exclusively, a form of commercial speech. This position is wrong because pandering can just as easily take place in a non-commercial setting as otherwise.

Lastly, the brief argues that pandering of child pornography deserves First Amendment protection because child pornography is not properly categorized as a form of speech and because pandering of child pornography is a form of immediate incitement to unlawful activity. Because this Section covers much more than pandering and because there is no empirical evidence of immediate incitement to unlawful activity from "pandering," this argument is totally illusory.

Brief Amicus Curiae of Morality in Media, Inc.

This brief argues that *Ginzburg* stands for the "common sense" principle that explicit material that might otherwise enjoy First Amendment protection of it is marketed for its obscene pornographic qualities. Although *Ginzburg* has not been overturned, its precedential value is questionable following *Virginia State Bd. of Pharmacy v.*

Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) which held that truthful, non-misleading commercial speech is protected by the First Amendment, although to a lesser degree than protected non-commercial speech.

Brief Amicus Curiae of the Rutherford Institute

Mr. Williams' response to all of the arguments raised in this brief are covered in Mr. Williams' response in to the brief filed by other amici curiae and/or the Petitioner.

CONCLUSION

Following this Court's decision in *Ashcroft v. Free Speech Coalition*, Congress enacted the PROTECT Act. However, the Section is still so unconstitutionally overbroad and vague that this Court cannot breathe constitutional meaning into the words "in a manner that reflects the belief, or that is intended to cause another to believe." The Section should simply be rewritten to avoid the constitutional infirmities on overbreadth and vagueness grounds.

"First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Ashcroft*, 535 U.S. at 253.

In the final analysis, in the interest of protecting children, Congress launched its legislative net well beyond the permissible object of child pornography and into the waters of protected speech.

For all the foregoing reasons, the Eleventh Circuit Court of Appeals ruled correctly and its decision should be affirmed.

Respectfully submitted,

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No. 06-694

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Neither respondent nor his amici seriously challenge the well-settled First Amendment principles that establish the constitutionality of Section 2252A(a)(3)(B). The statute prohibits advertisements, promotions, presentations, distributions, or solicitations of material (or purported material) that is characterized as being illegal child pornography. That proscription "capture[s] perfectly what remains clearly restrictable child pornography under pre- and post-*Free Speech Coalition* Supreme Court jurisprudence: obscene simulations of minors engaged in sexually explicit conduct and depictions of actual minors engaged in same." Pet. App. 19a. The First Amendment permits Congress to ban such offers or solicitations to transact in contraband. Respondent nevertheless maintains that the statute impermissibly penalizes non-commercial, false, or mistaken descriptions and thereby fails First Amendment overbreadth analysis. He also maintains that the statute is impermissibly vague.

Respondent's contentions are based on a misunderstanding about the scope of the statute and a misinterpretation of First Amendment law. The statute proscribes only offers to provide, or attempts to obtain, material that is, or is purported to be, contraband—a category that is unprotected by the First Amendment. The statute contains two subjective mental elements to protect against coverage of innocent speech, and it requires proof of an objective element—that the manner of offering or soliciting refers to child pornography—in order to protect against coverage of harmless speech. The persons covered by the statute are, therefore, those who knowingly propose or purport to propose an illegal

transaction. That conduct is not constitutionally protected, whether the transaction is commercial or noncommercial and whether or not the underlying material exists. Because society's compelling interest in stamping out the child pornography market permits Congress to suppress offers to provide it or efforts to seek it, this Court should sustain the facial constitutionality of 18 U.S.C. 2252A(a)(3)(B) (Supp. IV 2004).[1]

I. SECTION 2252A(a)(3)(B) CAPTURES NO PROTECTED SPEECH AND, IN ANY EVENT, IS NOT OVERBROAD

A. Section 2252A(a)(3)(B) Reaches No Constitutionally Protected Speech

1. *Commercial speech.* Neither respondent nor his amici point to any decision of this Court (or any other) holding that the First Amendment disables the government from proscribing speech that proposes an illegal commercial transaction. That is not surprising because, as explained in the government's opening brief (at 17-18), this Court repeatedly has stated that such speech falls entirely outside the scope of First Amendment protection. See, *e.g.*, *Zauderer* v. *Office of Disciplinary Counsel of the Sup. Ct.*, 471 U.S. 626, 638 (1985); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976) (*Virginia Pharmacy*). Likewise, respondent points to no case holding that commercial speech that is false, deceptive, or misleading is protected. Indeed, this Court has repeatedly made clear that it is not. See, *e.g.*, *Zauderer*, 471 U.S. at 638; *Virginia Pharmacy*, 425 U.S. at 771.[2]

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[1] Unless otherwise noted, all references to 18 U.S.C. 2252A(a)(3)(B) are to the Supp. IV 2004 edition.

[2] Amici The National Coalition Against Censorship, *et al.* (NCAC) suggest in a footnote (Br. 9 n.6) that this Court has afforded constitu-

Accordingly, as the court of appeals recognized (Pet. App. 20a-21a), the First Amendment poses no bar to Section 2252A(a)(3)(B)'s proscription of *commercial* solicitations of, or offers to make available, real child pornography, or false or misleading commercial efforts to do so.

2. *Non-commercial speech.* Neither respondent nor his amici cite any authority that *non-commercial* solicitations of or offers to engage in an illegal transaction enjoy any greater First Amendment protection than comparable commercial efforts.

a. Respondent argues that *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (see U.S. Br. 19-20), has no relevance here because that case involved explicit invitations to engage in illegal acts "in a commercial setting." Resp. Br. 13. But in holding that the gender-specific advertisements at issue were unprotected, *Pittsburgh Press* focused on their *illegal* nature, not on their commercial character. See *Pittsburgh Press*, 413 U.S. at 388-389; *Virginia Pharmacy*, 425 U.S. at 759. The logic of *Pittsburgh Press* thus applies to non-commercial promotions of illegal activity.

That conclusion makes sense. Neither respondent nor his amici explain why the Constitution would permit

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tional protection to false or misleading commercial speech. But, in fact, the only two cases cited by amici state that if "commercial speech concerns unlawful activity or is misleading * * * then the speech is not protected by the First Amendment." *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 367-368 (2002) (analyzing the First Amendment claim after noting that there was no allegation that the speech was misleading); *Ibanez* v. *Florida Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142-148 (1994) (analyzing First Amendment claim after stating that "false, deceptive, or misleading commercial speech may be banned").

suppression of offers to *sell* illegal goods or services, see *Pittsburgh Press*, 413 U.S. at 388, but not offers to give the contraband away for free. As explained in the government's opening brief (Br. 18-24), such non-commercial offers to provide and solicitations of contraband create the same harms as commercial offers and solicitations, and they are just as integrally tied to unlawful activity. Because child pornography is contraband whether it is given away or sold, the proscription in Section 2252A(a)(3)(B) against "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" such material does not infringe protected speech. Instead, it prevents market signaling and stimulation pertaining to a particularly destructive illegal item.

b. Respondent contends (Br. 14-16) that the imminent-incitement test of *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (per curiam), applies to non-commercial applications of Section 2252A(a)(3)(B). But he acknowledges (Br. 15) that this Court in *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), contrasted the type of speech covered in *Brandenburg*, with speech that has a "significantly stronger, more direct connection" to "illegal conduct," such as "attempt, incitement, solicitation, or conspiracy." 535 U.S. at 253-254. Respondent makes no attempt to explain why *Brandenburg* is relevant to the offers or solicitations here, or how that conclusion could be reconciled with other criminal statutes that outlaw criminal solicitation and that contain no immediacy or likelihood requirement. See *Free Speech Coal.*, 535 U.S. at 253-254; *Rice* v. *Paladin Enters., Inc.*, 128 F.3d 233, 265 (4th Cir. 1997), cert. denied, 523 U.S. 1074 (1998); see also U.S. Br. 26. Notably, none of respondent's amici even cite *Brandenburg*, much less argue that its imminent-incitement test applies here.

Respondent asserts (Br. 15) that *Brandenburg* applies because of Congress's inclusion of the term "promote" in the statutory prohibition. But, as the government has explained (U.S. Br. 27), "promote[]" in Section 2252A(a)(3)(B) should "be given related meaning" to the words surrounding it. *Dole* v. *United Steelworkers*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts* v. *Morash*, 490 U.S. 107, 114-115 (1989)). And "promotes" has a commonly used, comparable meaning to "advertises, * * * presents, distributes, [and] solicits" when used, as here, in relation to a product: "to present (merchandise) for public acceptance through advertising and publicity." *Webster's Third New International Dictionary* 1815 (1961). Contrary to respondent's assertion (Br. 15), construing "promote[]" to have this common meaning is not an improper use of the interpretive canon *noscitur a sociis*, but a proper search for *which* ordinary meaning of the word "promote" Congress intended in this context.[3] Given the company that "promote[]" keeps in this statute, as well as the constitutional questions that would arise if it were extended to encompass abstract advocacy, the word should not be given its broadest possible meaning. See, *e.g.*, *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383, 397 (1988); *New York* v. *Ferber*, 458 U.S. 747, 769 n.24 (1982).[4]

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[3] Some common meanings of promote would be nonsensical in this context. See, *e.g.*, Amici The Free Speech Coalition, *et al.* (FSC) Br. 8 (suggesting that promote means "to advance in station, rank, or honor: raise").

[4] The government does not invoke the *noscitur a sociis* canon to contend that "only speech regarding commercial exchanges is regulated." NCAC Br. 19-20. To the contrary, the government's brief expressly acknowledges that the statute's proscription encompasses non-commercial speech. See U.S. Br. 18-28. The government's point is that, in the context of the statute, all of the words have a transactional connota-

3. *False or fraudulent speech.* Amici (NCAC Br. 9 n.6) take issue with the government's reliance (Br. 29-30) on *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), for the proposition that the liars, braggarts, and exaggerators who fall within the coverage of Section 2252A(a)(3)(B) are not protected by the First Amendment because knowingly false speech is of no constitutional value. But this Court has stated exactly that. See *Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact."). Although the Court has accorded a measure of protection to some false statements of fact, it has done so only in circumstances not applicable here: to protect closely-related truthful speech that matters. See *id.* at 341. Thus, in the defamation context, the Court has protected some defamatory falsehoods about public figures because such statements, if true, would be deserving of protection, and "a rule of strict liability" would "lead to intolerable self-censorship." *Id.* at 340. But speech advertising, promoting, presenting, distributing, or soliciting child pornography is even more obviously *not* protected speech when it is truthful. Moreover, even where false statements are protected to ensure a robust discussion of ideas of public importance, such protection does not extend to a statement made "with knowledge that it was false." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). Those who knowingly lie, brag, or exaggerate in offering (or purporting to offer) real child pornography can therefore be punished even under *New York Times* v. *Sullivan*'s speech-protective standard. *Ibid.*

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tion (whether commercial or non-commercial) of offering to provide, or seeking to receive, and that "promotes" should be given a comparable construction.

Respondent also contends (Br. 17) that the statute cannot criminalize the conduct of persons who lie, brag, or exaggerate "about what he/she has to offer, or wants to acquire" because such persons have "a total absence of any criminal intent."[5] But such an individual has precisely the criminal intent required by Section 2252A(a)(3)(B). As the government explained (U.S. Br. 32-34), the statute's dual subjective-intent components train on (1) whether the defendant subjectively has "the belief," or "intend[s] to cause another to believe," that the material is child pornography, and (2) whether he "knowingly" engages in conduct (advertising, etc.) "in a manner" from which a reasonable jury would conclude that the materials, or purported materials, are illegal child pornography. 18 U.S.C. 2252A(a)(3)(B). A person who has those intents and engages in that conduct violates the statute even if he knows that the underlying materials are not actual child pornography. Such knowingly "[u]ntruthful speech, commercial or otherwise" has no value under the First Amendment. *Virginia Pharmacy*, 425 U.S. at 771.

4. *Mistaken speech.* Respondent contends (Br. 18-20) that Section 2252A(a)(3)(B) sweeps in constitutionally-protected mistaken speech. That claim misreads the statute and finds First Amendment protection where none exists.

a. Respondent argues (Br. 18) that the statutory phrase "reflects the belief" does not make clear whose belief is at issue and thus could refer to "the understanding or interpretation of the listener." By way of example, he contends (Br. 19-20) that, if a gymnastics coach

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[5] As noted in the government's opening brief (Br. 29 n.9), the concern about false speech about what purports to be child pornography has salience only for the offering side of the transaction.

offers to exchange pictures of his underage team with another coach who is a closet pedophile and believes that the offered pictures contain illegal child pornography, the innocent coach's conduct violates the statute. That is so, respondent claims (Br. 20), because the innocent coach has offered the pictures "'in a manner that reflects the belief'—to the pedophile—that the material is illegal child pornography."

That is not a reasonable reading of the statute. The "reflects the belief" phrase in the statute self-evidently refers to the speaker's belief; the phrase "or that is intended to cause another to believe" refers to the speaker's intent to instill a belief in his audience. See 18 U.S.C. 2252A(a)(3)(B). A speaker cannot be found criminally liable based on the idiosyncratic subjective understandings of listeners.

Respondent mistakenly contends (Br. 17) that the statute would ensnare an innocent speaker "who neither has, nor wants to provide or receive, any illegal child pornography material, but who inarticulately offers or solicits material which another listening person believes does constitute illegal child pornography." But such a speaker would lack the requisite subjective intent: he would neither possess "the belief" that the material was proscribable child pornography nor would he "intend[] to cause another to believe" that it was. 18 U.S.C. 2252A(a)(3)(B).[6]

b. Amici take issue (NCAC Br. 17) with the government's position that the statute's "in a manner" phrase creates an "objective benchmark." Amici argue that "manner" is defined as "[a] way of doing something or

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[6] As the government noted in its opening brief (Br. 33 n.11), this same result could be reached by limiting the "reflects the belief" language to solicitation prosecutions.

the way in which a thing is done or happens." *Ibid.* (quoting *American Heritage Dictionary of the English Language* 1065 (4th ed. 2000)). But that definition is consistent with reading the statute to require proof, to the satisfaction of a reasonable jury, that "the way in which" the defendant advertised, promoted, etc., the materials or purported materials reflected the belief or was intended to cause another to believe that the materials were real child pornography. The question is whether a defendant has engaged in conduct "in a manner" that violates the statute. That determination cannot be made by the standard of a deluded person or a pedophile, but only by that of a reasonable person familiar with the context of the communication in question.

c. Respondent (Br. 19) and amici (NCAC Br. 18-19) argue that the "knowingly" requirement of the statute does not apply to the "manner" in which material is represented. Amici go further by asserting (*id.* at 18) that the government has conceded that only a "tortured grammatical reading" of the statute could produce the government's understanding of the knowledge requirement. Both contentions are incorrect. The government merely acknowledged (Br. 34) that "knowingly" *could* be read to apply only to the immediately following clause ("advertis[ing], promot[ing], present[ing], distribut[ing] or solicit[ing]"). But it can be read equally plausibly to reach the "manner" of presentation as well. Courts are not required to select even the "most grammatical reading of [a] statute" when an alternative possibility exists that avoids constitutional concerns. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). Rather, the opposite is true. *Id.* at 78. Reading Section 2252A(a)(3)(B)'s "knowingly" element to encompass the "manner" in which the defendant represents material

constitutes a far more straightforward approach than the reading of 18 U.S.C. 2252 adopted in *X-Citement Video*, where the Court held that "knowingly" extended beyond the words immediately following it and qualified words in the next *subsection*. And to the extent that constitutional concerns would be raised by penalizing a person for advertising material when the person does not know that a reasonable person would interpret his words, in context, as referring to illegal child pornography (U.S. Br. 34), "[i]t is * * * incumbent upon [the Court] to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of Congress." *X-Citement Video*, 513 U.S. at 78.

B. Section 2252A(a)(3)(B) Reasonably Furthers Compelling Government Interests

1. Contrary to the claims of respondent (*e.g.*, Br. 6) and amici, Section 2252A(a)(3)(B) was not "designed to * * * circumvent this Court's decision in *Free Speech Coalition*." NCAC Br. 4. Instead, Congress passed Section 2252A(a)(3)(B) to *comply* with "the limitations established by that decision," S. Rep. No. 2, 108th Cong., 1st Sess. 6 (2003), while furthering the government's compelling interest in combating the distribution of child pornography and the sexual abuse inherent in its creation. By "criminaliz[ing] offers to buy, sell or trade anything that is purported to depict actual or obscene child pornography," *id.* at 10, Congress "remedie[d] the problem" identified by this Court of "penalizing individuals farther down the distribution chain for possessing images that, despite how they were marketed, are not illegal child pornography." Pet. App. 16a. There is certainly nothing sinister about congressional efforts to narrow the scope of a prohibition to comply with prior

Supreme Court precedent. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 715 (2005) (upholding statute while recognizing it was a "[l]ess sweeping" congressional response to decision striking down earlier statute).

Respondent and his amici incorrectly argue that, because this Court rejected the contention that the provisions at issue in *Free Speech Coalition* were necessary to dry up the market for child pornography, that rationale cannot suffice to defend the different provision at issue here. See, *e.g.*, NCAC Br. 11. That argument overlooks the fundamental distinctions between Section 2252A(a)(3)(B) and the provisions struck down by the Court in *Free Speech Coalition*, banning virtual child pornography. The Court concluded that the connection between that ban and drying up the market for *actual* child pornography was too "remote." See *Free Speech Coal.*, 535 U.S. at 253-254. Here there is "a significantly stronger, more direct connection" between offers of and solicitations for what is characterized as illegal material and drying up the market for that very material. *Ibid.* *Free Speech Coalition* itself recognized that the government "of course, may * * * enforce criminal penalties for unlawful solicitation." *Id.* at 251-252. Individuals who offer or solicit what purports to be child pornography create the appearance of a demand or supply, and thereby fuel the market for such material.

For the same reason, amici are incorrect in arguing that Section 2252A(a)(3)(B) "suppress[es] lawful speech as the means to suppress unlawful speech." NCAC Br. 11 (quoting *Free Speech Coal.*, 535 U.S. at 255). The provision applies only to *unprotected* speech—speech that offers to make available, or solicits, contraband. Section 2252A(a)(3)(B) does not criminalize the underlying materials, whether they are protected, unprotected,

or non-existent; rather, it targets soliciting and pandering. That is constitutionally indistinguishable from banning offers to provide, or solicitations to receive, substances that are believed or represented to be illegal drugs. See *Pittsburgh Press*, 413 U.S. at 388.

2. Congress made specific findings that addressed the concerns of this Court in *Free Speech Coalition*. Congress's findings demonstrate that offers and solicitations stimulate the market for child pornography, thereby resulting in actual children being abused to satisfy that market. See U.S. Br. 5-6; U.S. Br. App. 11a-15a. In those statutory findings, Congress emphasized the harm to real children, finding that "[t]here is no substantial evidence that any of the child pornography images being trafficked today were made other than by the abuse of real children." PROTECT Act, Pub. L. No. 108-21, § 501(7), 117 Stat. 677. It further found that "[t]he most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." § 501(3), 117 Stat. 676 (quoting *Ferber*, 458 U.S. at 760).

Amici argue (FSC Br. 19) that the objective of drying up the market for child pornography has no "logical nexus" to banning *fraudulent* offers to buy or to obtain child pornography. Congress expressly found, however, that "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Conf. Rep. No. 66, 108th Cong., 1st Sess. 61-62 (2003). Congress's judgment accords with common sense: the greater the perceived demand for or supply of a particular item, the more likely that the item will be sought or purveyed. In any event, fraudulent offers or solicitations clearly enjoy no First Amendment

protection, and prohibiting such fraudulent offers and solicitations eases the prosecution of offers of and solicitations for actual child pornography, which undeniably fuel the market.

Amici also argue (FSC Br. 20-21) that, even before *Free Speech Coalition*, only a few defendants were acquitted for any reason, and none resulted from a "'virtual child' defense." But despite increases in successful prosecutions of child pornography, the very Department of Justice report on which amici rely states that, "with advances in computer technology and increased availability and popular use of the Internet," the distribution of child pornography has expanded exponentially, and the globalization of such pornography crimes poses significant investigatory and prosecutorial challenges. See Office of the Inspector General, DOJ, *Report No. I-2001-07, Review of Child Pornography and Obscenity Crimes* 1 (July 19, 2001). As this Court has recognized, Congress has a compelling interest in drying up the market for child pornography in order to protect the real children who are abused to create it. See *Ferber*, 458 U.S. at 759-760; *Osborne* v. *Ohio*, 495 U.S. 103, 109-110 (1990). Congress concluded that barring offers and solicitations of child pornography—whether commercial or non-commercial, whether true or false—furthers that goal. See § 501(7)-(14), 117 Stat. 677-678.

C. Section 2252A(a)(3)(B) Is Not Overbroad In Relation To Its Plainly Legitimate Sweep

1. Respondent's amici cla[illegible] 18 U.S.C. 2252A(a)(3)(B) encompasses a wide range of commentary on fully protected sexually-explicit materials, including advertisements, movie reviews, and email discussions among friends about movies. See FSC Br. 12-

18; Amici American Booksellers Foundation for Free Expression, *et al.* (ABFFE) Br. 11-16; NCAC Br. 13-14. But amici's assertions sweep into the statute speech that it plainly does not cover.

If, as one amici brief claims, amici's products are "neither obscene nor child pornography," ABFFE Br. 13, then *accurately* advertising, promoting, presenting, or distributing those products would not violate Section 2252A(a)(3)(B). In suggesting otherwise, respondent and his amici gloss over the fact that the statute applies only if an advertiser, promoter, or presenter characterizes the materials as illegal child pornography (*i.e.*, "visual depiction[s] of an *actual* minor," or "obscene visual depiction[s] of a minor," engaging in sexually explicit conduct). 18 U.S.C. 2252A(a)(3)(B)(i) and (ii) (emphasis added). In addition, the advertiser, promoter, or presenter would have to know that a reasonable person would so interpret the promotions, and would have to believe that the material was illegal child pornography or intend to cause another person to so believe. *Ibid.* As Congress observed, the producers of mainstream movies "do not intend for viewers to believe that real children are actually engaging in sexual activity." S. Rep. No. 2, *supra*, at 10 n.6.[7]

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[7] Amici suggest (FSC Br. 9-12) that, because movie producers intend for viewers to engage in a "willing suspension of disbelief," all movie producers "intentionally seek to create the belief within their viewers that what is happening on the screen * * * is happening in reality." *Id.* at 9. But the cinematic experience of *willing* "suspension of disbelief" does not mean that movie-goers forget that they are watching actors. Movies commonly depict wars, nuclear catastrophes, murders, marriages, and divorces, and no rational viewer believes these events

Thus, the statute does not ban truthful descriptions on Netflix.com or amazon.com of the plot of a movie that is not illegal child pornography. The speakers in such advertisements do not possess the requisite subjective or objective intent: they do not believe, or intend for others to believe, that the advertised or promoted movie is real child pornography.

Nor would a reasonable person using amazon.com understand the advertisements quoted by amici (FSC Br. 14-16), in context, as representations that the movie actually contains depictions of real children engaging in sexually explicit conduct, or obscene depictions of children engaging in sexually explicit conduct. For example, amici point to amazon.com's description of *Thirteen* stating "'Brace yourself' (Rolling Stone) for a raw, revealing insight into urban adolescence that's so intense and realistic . . . thirteen-year-old Tracy . . . goes to shocking lengths in order to befriend . . . the most popular girl in school . . . leaving Tracy's desperate mom . . . powerless to rescue her from a whirlwind of drugs, sex and crime" (FSC Br. 15-16), and amazon.com's description of *Y Tu Mama Tambien* as being about a "three-way odyssey of two 17-year-old Mexican boys . . . and a 28-year-old Spanish beauty" that has "enough male and female nudity to qualify as softcore porn" (FSC Br. 14). Neither of those advertisements would cause a reasonable viewer to believe, in context, that the movies *visually depict* an actual minor engaged in sexually explicit conduct on screen (as opposed to merely create an understanding that sexually explicit conduct is occurring as part of the storyline), or that the

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are actually happening to the actors. Promotions of movies are understood in that light.

advertiser so believes or intends to cause the viewer to so believe.[8]

Although Section 2252A(a)(3)(B) could *theoretically* reach advertisements or promotions of movies whose storylines deal with sexually explicit themes involving underage characters, including ones where the viewers are meant to understand that those characters have engaged in sexually explicit conduct (*e.g.*, *The Lover*, *Y Tu Mama Tambien*, *Fast Times at Ridgemont High*), the statute would be implicated only if the movies are knowingly advertised or promoted in a manner that would suggest to a reasonable observer that the movie is or contains illegal child pornography. A knowing (and false) promotion of that kind (which presumably would claim that the underage actors were not acting and the sex scenes were real) would not enjoy constitutional protection.[9]

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[8] Amici suggest (NCAC Br. 8-9) that advertisements, promotions, etc., of "materials that use adult actors or computer-generated images to portray minors engaged in sexually explicit conduct" and that are promoted as "hot pictures of kids having sex" could "not strictly be described as 'true' or 'false,'" yet could be ensnared by the statute. But if such promotions are knowingly done in a manner from which a reasonable observer would conclude that the materials depict actual children engaging in sexually explicit conduct, and the speaker intends to cause others to so believe, those promotions are not only patently false but also promotions of a transaction in contraband, and would and should be captured by the statute.

[9] Movies, of course, simulate activity that is not actually taking place, and allusions to simulated acts do not necessarily implicate Section 2252A(a)(3)(B). Nevertheless, "simulated" sexual activity by real minors can fall within the definition of "sexually explicit conduct" in 18 U.S.C. 2256(2)(A) (Supp. IV 2004), and promotions or advertisements that objectively and subjectively reflect or seek to instill the belief that real minors are simulating sex on screen *may* fall within Section 2252A(a)(3)(B). (Much would depend on the degree of detail and

Nor does Section 2252A(a)(3)(B) criminalize speech that is simply "about" sexually explicit materials (see NCAC Br. 4), or that merely critiques or describes such materials (see, *e.g.*, FSC Br. 12-18). Branding movies as "morally offensive" is not "promot[ion]" of such films.[10] As explained (U.S. Br. 27-28), the statutory proscription targets only those who knowingly purport to make available or solicit materials—whether for sale, for barter, or for free. It does not include speakers who simply express an opinion about or describe a movie that is independently distributed by others. Amici are thus incorrect in suggesting that the statute reaches "film critics, movie reviewers, and other persons interested in commenting on" movies. See FSC Br. 12-18.

Similarly, the statutory language does not encompass the hypothetical emails posited by amici NCAC (Br. 14-15). Senders who express disgust about a film (through sarcasm or otherwise), or who seek to block or boycott material they believe to be child pornography, are not "advertis[ing], promot[ing], present[ing], or distribut[ing]" that material within the meaning of Section

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explicitness.) But the use of real minors to simulate sexually explicit activity *is* proscribable child pornography, wholly apart from any effort to promote or advertise it. See *Ferber*, 458 U.S. at 765 (noting that New York's child pornography statute reached "actual or simulated" described sex acts) (quoting N.Y. Penal Law § 263.00(3) (McKinney 1980)); *id.* at 763 (explaining that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized," or "[s]imulation outside of the prohibition of the statute could provide another alternative"). If films cross that line, promotions of them as such are not protected speech.

[10] Of the eight reviews by the Conference of Catholic Bishops cited by amici (FSC Br. 15-17), the Conference rates all but one "morally offensive." See, *e.g.*, <http://www.usccb.org/movies/f/fasttimesatridgemonthigh1982.shtml>.

2252A(a)(3)(B): they are not offering to transact in illegal pornography, nor would an objective observer conclude, in the context of the hypotheticals, that the sender was doing so. For that reason, the hypothetical library patron who seeks to block purported "kiddie porn" from the library's computers or the activist who seeks stricter laws (NCAC Br. 15) is not covered by the statute. Those scenarios are far removed from the intended applications of the statute.

In contrast, if an individual, like respondent, enters a chat room dedicated to child pornography, and offers to provide "hot pictures of kids having sex" or "steamy scenes of an old man having sex with a 12-year-old Lolita" (NCAC Br. 9), the individual could properly be prosecuted under the statute because such offers are reasonably construed as offering illegal child pornography. The question is one of context. As the district court recognized (Pet. App. 65a), the statute "only imposes criminal liability upon an individual who not only has the intent to, but also creates the context which would cause another to believe the material he or she is trying to promote contains obscenity or actual child pornography."

2. Even if the statute, correctly construed, encompassed any protected expression, the reach of the statute would not be "sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Respondent must demonstrate that the overbreadth of the statute is "not only * * * real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Neither respondent nor the court of appeals has compared the arguably impermissible applications to the

clearly constitutional sweep of the law. The plainly permissible applications are vast. The government regularly encounters pedophiles who offer to provide, through the file-sharing technology of the Internet, tens of thousands of photographs or videos of the sexual abuse of actual children.[11] Offers and solicitations by those pedophiles are the target of this provision. In stark contrast, respondent's amici point to fewer than twenty movies the advertisements and promotions of which they fear might be covered. Their fears are misplaced. But even if some of their examples *might* be covered, any impermissible applications can be avoided through case-by-case adjudication. *Virginia* v. *Hicks*, 539 U.S. 113, 124 (2003); *Ferber*, 458 U.S. at 773-774.

II. SECTION 2252A(a)(3)(B) IS NOT IMPERMISSIBLY VAGUE

Respondent makes no attempt to argue that his statements (see U.S. Br. 6-8) fall outside of Section 2252A(a)(3)(B), or that law enforcement officers lacked sufficient guidance to apply the statute to his conduct. Therefore, if the Court rejects respondent's overbreadth challenge, it should not entertain his facial vagueness challenge. See *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496-497 (1982); *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983). Respondent does not contend otherwise.[12]

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[11] See, *e.g.*, *United States* v. *Sebolt*, 460 F.3d 910, 912-914 (7th Cir. 2006) (individual who possessed 27,000 images of child pornography operated a file server in which he would allow the download of three images for every one image uploaded); *United States* v. *Rowe*, 414 F.3d 271, 273-274 (2d Cir. 2005) (same, with 12,000 images and videos, offering to trade one picture for one picture).

[12] Although amici assert that "facial vagueness challenges are permitted if the law in question reaches 'a substantial amount of constitu-

Instead, respondent claims (Br. 24) only that the statute is vague as to others. He argues that the language "in a manner that reflects the belief, or that is intended to cause another to believe" provides "no standard or objective measure to educate the public as to what behavior is lawful versus what behavior is unlawful." Respondent's vagueness arguments, and those of his amici, fail for the same reasons as their overbreadth arguments: the arguments are based on an unduly expansive reading of the provision that ignores its language and the contextual parameters it provides. That language is not devoid of any readily identifiable "core." *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974). And the hypotheticals posited by respondent's amici do not establish the vagueness of the statute any more than did those of the court of appeals. See U.S. Br. 46-48. The fact that someone has "upload[ed] a video to the Internet with the description, 'Hot, Heavy, and Graphic Teen Sex'" (see NCAC Br. 25-26) would not be enough, without more context, to create liability under the statute. A statute is not rendered vague by positing scenarios that clearly fall outside its coverage.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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tionally protected speech [sic],'" NCAC Br. 24 n.16 (citing *Kolender*, 461 U.S. at 358 n.8), amici stop short of contesting the government's point: that respondent cannot challenge the statute as facially vague if the Court concludes that the statute is not constitutionally overbroad. U.S. Br. 44-45 & n.17.

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In the

Supreme Court of the United States

United States of America,
Petitioner,

v.

Michael Williams,
Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE STATES OF ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, KANSAS, MAINE, MARYLAND, MICHIGAN, MINNESOTA, NEBRASKA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 2252A(a)(3)(B) is overbroad and impermissibly vague, and thus facially unconstitutional, when the statute prescribes punishment for one who "knowingly advertises, promotes, presents, distributes, or solicits ... any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is or contains" illegal child pornography.

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INTEREST OF AMICI

Child pornography was once traded by mail or by hand. Risk of detection and the resulting public humiliation was a built-in deterrent to a person tempted to participate in its distribution. And perhaps more importantly, there was never any question, and no difficulty of proving, that real flesh-and-blood children were involved in its creation.

But times have changed. Today computers provide pornographers and pedophiles with a cloak of anonymity. When pornographers gained the ability to trade images electronically and in secret, opportunities for "pandering" skyrocketed, and so (not surprisingly) did the incidents of trading in illegal child pornography. At the same time, pandering became a cyberspace crime without borders rather than a trade in physical goods at a physical location.

State and federal prosecutors struggle to keep up. The criminals can now digitally alter images of real children by making those images *appear* to be computer-generated. The pornographers claim that the images they transmit are not real child pornography, thus forcing prosecutors to prove otherwise and making it increasingly difficult to close the network for illegal child pornography. State and federal prosecutors need robust laws that account for the technological revolution and that will allow the government to protect children in the digital age. The Eleventh Circuit's decision in this case stripped away a vital prosecutorial tool – namely, the ability to target directly an intentional offer to trade in illegal material, irrespective of whether the prosecutor is able to locate the image or specifically to prove that it has been digitally altered to disguise a real child.

The States have a strong interest here because many of them have laws on the books – laws that protect children – that may be endangered by the Eleventh Circuit's decision. Moreover, the States recognize that child pornography is a uniquely pervasive, hidden, and borderless crime, and that

prosecutorial cooperation between state and federal agents is essential. The States therefore have an interest in seeing the United States possess the full panoply of anti-child pornography powers, lest State prosecutors become overwhelmed with too many criminals and too few tools to battle a national (and international) trade.

SUMMARY OF ARGUMENT

I. This Court has recognized that the government has a compelling interest in closing the network for illegal child pornography, and that is precisely what the PROTECT Act's pandering provision is designed to do. Current technology allows pornographers to take images made with real flesh-and-blood children and disguise them so that they appear to be computer-generated. In almost every prosecution, the criminals claim that they were trading virtual pornography and not the real thing. This stock "virtual defense" makes the prosecution of child pornography cases increasingly difficult and expensive. The statute at issue here serves an important need by directly targeting an offer to transact in unprotected material. It is critical in the digital age that pandering prosecutions do not remain dependent on the nature of the material, at least where, as here, there is a provable intent to expand the network for child pornography.

The congressional findings clearly demonstrate the link between the PROTECT Act's aims and the government's compelling interest in closing the network for child pornography. Congress' efforts are further supported by several state statutes that address distribution of child pornography in a similar manner. The Eleventh Circuit's analysis calls some of these statutes into question, demonstrating that much more is at stake here than a single law.

II. The PROTECT Act's pandering provision is not overbroad. Because there is nothing unconstitutional about criminalizing an offer to transact in child pornography, the

statute is not overbroad to the extent that it focuses on the intent of the panderer and not the actual content of the material. In fact, the statute does not prohibit or chill any protected speech, because it does not prohibit advocacy speech, straight-forward offers to exchange virtual pornography, or benign distribution of family photos. By its terms, the statute applies only where the defendant *intentionally offers* to transact in pornography made with real children.

III. Nor is the statute unconstitutionally vague. The Eleventh Circuit simply misread the statute and failed to give the key term "knowingly" its proper meaning. Correctly interpreted, the statute provides fair notice of what conduct is proscribed and properly restricts prosecutors' discretion.

ARGUMENT

The underlying facts of Williams' lurid crime are set forth in the Eleventh Circuit's opinion, *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006). Suffice it to say that Williams distributed *real* pictures of *real* children engaged in *real* sexually explicit conduct, and was charged with one count of "pandering" material "in a manner that reflects the belief, or that is intended to cause another to believe," that the material contains illegal child pornography in violation of 18 U.S.C. § 2252A(a)(3)(B), a provision of the PROTECT Act. *Id.* at 1289. Williams posted the illegal child pornography after an exchange with an undercover law enforcement officer in an internet chat room. Williams boasted, "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL – SHE CANT." *Id.* at 1288-89.

Williams entered into a plea agreement that reserved his right to challenge the constitutionality of the pandering provision. The Eleventh Circuit reversed Williams' conviction under the pandering provision on First Amendment grounds, holding that the provision was unconstitutionally overbroad and vague. The Eleventh

Circuit was wrong on both counts. It misapplied this Court's overbreadth analysis, misread the statute's express intent requirement, and in the process called into question many sound and important state laws.

I. THE PROTECT ACT'S PANDERING PROVISION IS NECESSARY TO ABOLISH THE NETWORK FOR CHILD PORNOGRAPHY.

The PROTECT Act's pandering provision is a critical prosecutorial tool, and an analysis of its usefulness will lend much-needed context to the overbreadth and vagueness issues in this case. The statute is necessary because of what the criminals can do with technology and because of the difficulty (perhaps soon to be impossibility) of proving that an image is, in fact, of a real child and not computer-generated. It allows prosecutors directly to target an offer to transact in illegal child pornography even in cases where the material cannot be located or has been digitally altered, or where a person is expanding the network for child pornography with material that may not otherwise be obscene. The congressional findings and comparable state statutes amply support Congress' efforts to close the network for child pornography through the PROTECT Act.

A. The Congressional Findings Amply Demonstrate the Necessity of the Protect Act's Pandering Provision.

Congress passed § 2252A(a)(3)(B) to close the network of illegal child pornography: "The crux of what this provision bans is the offer to transact in this unprotected material, coupled with proof of the offender's specific intent." S. Rep. No. 2, 108th Cong., 1st Sess. 12 (2003). As this Court recognized in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), the government has a compelling interest in closing the child-pornography distribution network. *Ferber*, 458 U.S. at 759; *Osborne*, 495 U.S. at 109. The congressional findings

amply support the pandering provision and its vital connection to the government's interest.

Congress emphasized that technology currently exists – and, indeed, is inexpensive and readily available – to take images of real children and disguise them by making them appear to be computer-generated. Pub. L. No. 108-21, 117 Stat. 676 § 501(5), (11). Congress also recognized that as digital files are transferred over the internet again and again, they degrade "so as to make it difficult for even an expert conclusively to opine that a particular image depicts a real child." § 501(8).

Pornographers know that Congress' assessment is correct. They also know well this Court's decision in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), which holds that the government cannot criminalize the possession or manufacturing of "virtual" child pornography.[1] Therefore, defendants arrested for dealing in unprotected child pornography *claim* routinely that their images are fake, thus requiring the government to prove beyond a reasonable doubt that images are in fact of real flesh-and-blood children. § 501(7), (10). The proliferation of this "virtual defense" [2] has made prosecution of child pornography crimes more difficult and expensive. § 501(9), (10).[3] Prosecutors, for

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[1] The amicus States disagree with this Court's holding in *Free Speech Coalition*. *See infra* at 13-14.

[2] Cases recognizing the availability of the "virtual defense" include, e.g., *United States v. Miller*, ___ F.Supp.2d ___, 2007 WL 188277 (N.D. Ohio Jan. 22, 2007); *United States v. O'Rourke*, 470 F.Supp.2d 1049 (D.Ariz. 2007); *United States v. Knellinger*, 471 F.Supp.2d 640, 647 n.6 (E.D.Va. 2007); and *United States v. Steiger*, ___ F.Supp.2d ___, 2006 WL 3450140 (M.D.Ala. Nov. 29, 2006).

[3] At the same time that prosecutions are becoming more difficult and expensive in light of the technology available to pornographers, the internet (and its anonymity) makes it easier for pornographers to distribute their wares. Because trades occur at computer terminals rather than in large cities' red light districts, the child pornography network is more widespread than ever. In 2001, only 30% of state prosecutor's

example, the prosecution may be required to present expert testimony that an image depicts a real child. *See e.g., United States v. Rodriguez-Pacheco*, 475 F.3d 434, 444 (1st Cir. 2007)

Recognizing that pornographers hide behind such dangerous claims, Congress drafted the PROTECT Act's pandering provision to reach those situations where it is difficult or impossible to prove that real children were involved. Even if an image of a real child has been digitally disguised to appear virtual, a panderer can be prosecuted where he holds the image out to be real (and illegal) child pornography.

It is critical that prosecutors be allowed to target offers to trade in illegal pornography and not just the images themselves. When pornographers trade images and hold them out as depicting real children, they expand the network for child pornography – whether or not the images are real and whether or not the government can locate the images and *prove* that they are real. The PROTECT Act works to undermine the market and network for illegal child pornography by reaching distribution of images that are advertised as the "real thing" in an effort to develop trade relationships.

B. State Obscenity Statutes Targeting Distribution of Child Pornography Demonstrate the Need for the PROTECT Act's Pandering Provision.

As technology increasingly causes widespread problems for prosecutors of child pornography cases, many state

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offices litigated crimes related to computer transmission of child pornography. Prosecutors in State Courts, 2001, p. 5 (http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf) (last visited May 24, 2007). By 2005, just four years later, that number had risen to *two-thirds* of state prosecutor's offices which had prosecuted such crimes. Prosecutors in State Courts, 2005, p. 5 (http://www.ojp.usdoj.gov/bjs/pub/pdf/psc05.pdf) (last visited May 24, 2007).

legislatures have addressed the issue in their obscenity statutes. They have done so in a variety of ways, often by expanding the definition of child pornography. Several such statutes are summarized below. The amicus States reference these statutes to make two points: First, the very existence of these statutes underscores the legitimacy of Congress' concerns about the impact of technology on child pornography prosecutions. States have the same concerns, as shown by the fact that the issue shows up time and again in legislation. And second, more is at stake in this case than just the PROTECT Act. The faulty reasoning of the Eleventh Circuit casts doubt on a number of very sensible (and constitutional) state statutes as well.

Some of the state statutes summarized below address distribution or advertisement of "virtual" pornography, "morphed" images,[4] and digitally altered images. The CPPA, invalidated in *Free Speech Coalition*, also addressed such material (but in a different way and for a different purpose). Therefore, before discussing the state statutes at issue, it is important to emphasize that this is *not* a virtual porn case and *Free Speech Coalition* does not require affirmance of the Eleventh Circuit's judgment. In *Free Speech Coalition*, this Court held that the government may not criminalize the *possession* or *production* of virtual child pornography where real children were not involved in its creation. 535 U.S. at 256-57. The provision of the PROTECT Act at issue here addresses a very different issue: the *knowing* distribution or promotion of images, whether or not the images are illegal child pornography, where the distributor intentionally passes the images off as depicting real children (and where the distributor is therefore expanding the network and market for child pornography). The statutes have a very different focus, even though both the

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[4] "Morphing" is the alteration of "innocent pictures of real children so that the children appear to be engaged in sexual activity." *Free Speech Coalition*, 535 U.S. at 242. The anti-morphing provisions in the CPPA were neither challenged nor addressed in *Free Speech Coalition*. *Id.*

CPPA and the PROTECT Act attempt to deal with the prosecutorial difficulties presented by technology.

State legislatures around the country are likewise attempting to deal with the same difficulties, further demonstrating that virtual porn, morphing, and digitally disguising real pornography are very real (and related) problems and that the PROTECT Act's pandering provision is a necessary prosecutorial tool. These statutes target the network for child pornography in a fashion similar to Congress' approach in the PROTECT Act:

- Georgia's child pornography statute defines "identifiable child" as any person under 16 "[w]ho was a child at the time the visual depiction was created, adapted, or modified or *whose image as a child was used in creating, adapting, or modifying the visual depiction.*" O.C.G.A. § 16-12-100.2(b)(2)(A) (emphasis added).

- Hawaii's statute defines "child pornography" to include pictures or computer-generated images "created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct." H.R.S. § 707-751(2).

- In Kentucky, "[a] person is guilty of promoting [the] sale of obscenity when he knowingly, as a condition to a sale . . . of any . . . publication or other merchandise, requires that the purchaser or consignee receive any matter *reasonably believed* by the purchaser or consignee to be obscene . . . ." KRRS § 531.060(1) (emphasis added).

- Minnesota's statute defines "pornographic work" to include a picture or computer-generated image that "(ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or (iii) is *advertised, promoted, presented, described, or distributed in such a manner that*

conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct." M.S.A. § 617.246(f) (emphasis added).

- Missouri's statute criminalizes the promotion and advertisement of "child pornography," defined to include pictures and computer-generated images of sexually explicit conduct where "such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct." V.A.M.S. 573.010(2)(b)b.

- Rhode Island's statute criminalizes the distribution of "child pornography," defined to include visual depictions "created, adapted, or modified to display an identifiable minor engaging in sexually explicit conduct," R.I. Gen. Laws § 11-9-1.3(c)(iii), but makes it, an affirmative defense that "[t]he defendant did not *advertise, promote, present or distribute the material in such a manner as to convey the impression that it is or contains a visual depiction of a minor engaging in sexually explicit conduct*, § 11-9-1.3(d)(1)(iii) (emphasis added).

- Texas' statute criminalizes the promotion of obscene material, including promotion of "an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age." V.T.C.A. § 43.23(h)(2)

- Wyoming's statute defines "child pornography" to include a visual depiction "of explicit sexual conduct involving a child or an individual *virtually indistinguishable* from a child." Wyo. Stat. Ann. § 6-4-303(a)(ii)(B) (emphasis added).

These statutes show that the practical difficulties that led to passage of the PROTECT Act are felt, in a big way, on the

state level. The PROTECT Act and comparable state statutes simply must be flexible enough to reach pandering in cases where material is distributed in an intentional effort to expand the network for child pornography. If the judgment of the Eleventh Circuit stands, many sound and important state statutes may face the same fate as the PROTECT Act.

II. THE PROTECT ACT IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. The Government May Constitutionally Criminalize An Offer to Transact in Unprotected Material.

1. An Offer to Transact In Real Child Pornography Expands the Market Regardless of What Material the Panderer in Fact Possesses.

The Eleventh Circuit held that the PROTECT Act's pandering provision is overbroad because it criminalizes the pandering of material that may not be real child pornography:

> We echo Senator Leahy's concern that the provision thus "federally criminalize[s] talking dirty over the Internet or the telephone when the person never possesses any material at all." In a non-commercial context, any promoter – be they a braggart, exaggerator, or outright liar – who claims to have illegal child pornography materials is a criminal punishable by up to twenty years in prison, even if what he or she actually has is a video of "our Gang," a dirty handkerchief, or an empty pocket.

Williams, 444 F.3d at 1298. That is, a defendant who uplinks images with a tagline that says, "This is real child pornography - have more to trade," violates the pandering provision even if the images are *not* real child pornography. That does not, however, make the statute "overbroad." A statute is overbroad only to the extent that it criminalizes

protected speech. Here, the statute applies only when the panderer is intentionally offering to transact in unprotected materials. The First Amendment does not protect such conduct.

As an initial matter, the Eleventh Circuit was incorrect to label this speech as "non-commercial." As the facts of this case demonstrate, child pornographers are not in the business (typically, anyway) of distributing pornography for free. Exchanges may not always be made for a payment of money *per se*, but images are routinely swapped for other images or to build a relationship that will lead to future exchange. Bartering is the original commercial activity, and, even today, bartering is as much commercial activity as a sale for cash.[5]

Moreover, the "innocent" braggarts, exaggerators, and liars for whom the Eleventh Circuit's decision showed such concern are not really innocent at all. Whether they have a real image to distribute or not, only persons who intend to foster and expand the network of child pornography fall within the statute. Whether the distributor has pornography made with real children or "an empty pocket," *Williams*, 444

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[5] "Commercial speech" is "speech that *proposes* a commercial transaction." *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989). Williams, like other panderers, proposed a commercial transaction, a trade or barter of illegal images. The transaction does not lose its commercial character simply because one image is traded for another instead of for cash. As commercial speech (to the extent the conduct at issue should be classified as "speech"), an offer to transact in child pornography can be regulated whether or not real children are depicted in the advertised image. If the image is in fact made with real material, it is illegal contraband, and advertisement for illegal items may be prohibited. *E.g. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973). If it is *not* real child pornography but is advertised as such, the advertisement may be barred as false or fraudulent speech. *E.g. Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24 (1976).

F.3d at 1298, he either (i) believes that he is distributing illegal child pornography or (ii) is attempting to convince the recipient that a specific image is illegal child pornography. In either case, the panderer is intentionally offering to transact in unprotected material, and the government may constitutionally ban that conduct in furtherance of the government's acknowledged and compelling interest in closing the network for child pornography. *See Ferber*, 458 U.S. at 759; *Osborne*, 495 U.S. at 109.

In this case, Williams posted illegal child pornography in a public chat room to show that he was "for real" – that he had real images to exchange. He was demonstrating his product and was expanding and promoting the network of child pornography on both the supply and demand sides of the equation. Had Williams posted images that were *not* real pornography, but that were presented in such a manner, *Williams still would have promoted and expanded the network for illegal child pornography* because others in the chat room still would have identified Williams as a person who desired to trade in pornography made with real abused children. Williams' conduct thus expanded the market regardless of the nature of the image that he posted.[6]

2. A Market-Deterrence Rationale Is Sufficient To Support the PROTECT Act.

It is true that in *Free Speech Coalition*, this Court held that a market-deterrence theory alone could not support a ban on the production or possession of virtual pornography:

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[6] Even if Williams had posted a video of "Our Gang," *Williams*, 444 F.3d at 1298, or if the other participants in the chat room had concluded that Williams was mistaken or fraudulent about the nature of the images he had, Williams would have nonetheless identified himself as a user who desired to trade in illegal pornography. And had Williams been merely deluded about the nature of the image he posted, he would not have been prosecuted for his mistaken *beliefs*, but instead for his conduct of offering to transact in illegal child pornography.

> If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice . . . .
>
> Even if the Government's market deterrence theory were persuasive in some contexts, it would not justify this statute.

Free Speech Coalition, 535 U.S. at 254. For two reasons, however, that does not mean that a market-deterrence theory is insufficient in this case.

First, even if market-deterrence was insufficient to support the CPPA, it is a better fit with the PROTECT Act. The pandering provision works to close a loophole created by technology (and, in candor, by *Free Speech Coalition*). It criminalizes conduct that directly and immediately expands the market for illegal child pornography even in cases where the distributor is mistaken, fraudulent, or unable to determine whether a real child was used in creation of the image. Here Congress did not address the viewing or creation of virtual porn, as it did in the CPPA. Instead, Congress prohibited intentional conduct – pandering – that directly and immediately expands the market for pornography made with real abused children.

Second, and with respect, this Court erred by concluding that the government's market-deterrence rationale was insufficient to support the CPPA. There is no support for this Court's assumption in *Free Speech Coalition* that "[i]f virtual images were identical to illegal child pornography," pornographers would stop photographing real children. *Id.* at 254. This Court assumed that if pornographers could create on their computers child pornography that is identical to the real thing, they would not create real child pornography because it presents the risk of prosecution. But that argument

presumes the rationality of pedophiles who are, by definition, irrational. In addition, even if child abusers stopped photographing children, that would not stop the sexual abuse of children that occurs separate from the production of child pornography. As Congress found with respect to the PROTECT Act,

> [a] child pornography results from the abuse of real children by sex offenders; the production of child pornography is a byproduct of, and not the primary reason for, the sexual abuse of children. There is no evidence that the future development of easy and inexpensive means of computer generating realistic images of children would stop or even reduce the sexual abuse of real children or the practice of visually recording that abuse.

§ 501(12).[7]

A market in *virtual* pornography, therefore, is not in any way, shape, form, or fashion good for children. It makes prosecution of real child pornography cases more difficult, increases the market for real child pornography, whets the appetite of sexual abusers, and may be used to lure children into abusive situations. While this Court can reverse the

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[7] Similarly, this Court was wrong in *Free Speech Coalition* when it rejected the government's argument that virtual pornography may be used to seduce children:

> There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.

535 U.S. at 251-52. A computer-generated image of children being sexually abused simply cannot be equated to a lollipop. Cartoons, video games, and candy are innocent things that can be perverted by evil people. Virtual images of children having sex, used to lure children into abusive situations and to convince them that sexual abuse is "normal," are evil *per se*. Images of children having sex, whether real or virtual, are not innocent in their creation and have no legitimate purpose.

Eleventh Circuit without abandoning its holding in *Free Speech Coalition*, the amicus States ask the Court to take this opportunity to (at the very least) clarify that virtual child pornography does *not* lead to less child abuse. Even if the law cannot ban all virtual pornography, it can ban the pandering of such material (as in the PROTECT Act), and the law certainly should not *encourage* the creation of virtual pornography.

3. Solicitation Statutes Show that Congress May Constitutionally Target the Panderer's Intent.

There simply is no constitutional difficulty in the fact that a person may be prosecuted for offering to transact in illegal child pornography even when the material he offers to share is not, in fact, unprotected material. There is a comparable offense in many solicitation statutes, such as Illinois', which define "solicitation" to include solicitation of one whom the defendant "*reasonably believes*" to be a minor. *See, e.g.*, 720 ILCS 5/11-6(a) ("A person . . . commits the offense of indecent solicitation of a child if the person . . . knowingly solicits a child *or one whom he or she believes to be a child* to perform an act of sexual penetration or sexual conduct . . . .") (emphasis added).[8] That is, a person may be prosecuted

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[8] States with similar solicitation statutes include Alaska (AS § 11.41.452(a)(2)); Arkansas (A.C.A.. § 5-27-603(a)(1)); Florida (F.S.A. § 847.0135(3)); Georgia (Ga. Code. Ann. § 16-12-100.2(d)(1)); Idaho (I.C. § 18-1509A(1)); Maine (17-A M.R.S.A. § 259(I-A)(A)(3)); Minnesota (M.S.A. § 609.352(2)); Montana (Mont. Code Ann. § 45-5-625 (1)(c)); Nebraska (Neb.Rev.St. § 28-320.02(1)); New Hampshire (N.H. Rev. Stat. § 649-B:4); Ohio (R.C. § 2907.07(C)(2)); Oklahoma (21 Okl. St. Ann. § 1040.13a(B)); Rhode Island (R.I. Gen. Laws, § 11-37-8.8(a)); South Carolina (Code 1976 § 16-15-342(A)); South Dakota (SDCL § 22-24A-5(A)(2)); Tennessee (T.C.A. § 39-13-528 (a)); Texas (V.T.C.A. Penal Code § 33.021(a)(1)(B)); and West Virginia (W. Va. Code § 61-3C-14b). *See also, United States v. Sims*, 428 F.3d 945, 960 (10th Cir. 2005) (holding that "it is not a defense to an offense involving enticement and exploitation of minors[, in violation of 18 U.S.C. § 2242,] that the defendant falsely believed a minor to be involved") (citing *United States v. Meek*, 366 F.3d 705, 717 (9th Cir. 2004); *United States v. Root*, 296

for soliciting an actual minor or for soliciting an adult undercover police officer.

Normally, of course, it is not illegal to ask an *adult* for sex. But under these statutes it is illegal to do so if the defendant believes he is approaching a child (that is, if he *offers* to have sex with a child). In precisely the same manner, it normally is not illegal to distribute a picture that is not child pornography. However, under the PROTECT Act, it is illegal to do so if the defendant thereby *offers* to transact in illegal child pornography. In prosecutions under the solicitation statutes, the defendant is not prosecuted for his mistaken belief that his target is an actual minor. Instead, he is prosecuted for his offer to engage in illegal conduct, *i.e.*, sexual relations with a minor. Likewise, in prosecutions under the PROTECT Act's pandering provision, the defendant is not prosecuted for what he believes about any pictures, but rather for his intentional offer to transact in illegal child pornography. Like the solicitation statutes, the pandering provision is constitutional.

B. The PROTECT Act Does Not Criminalize Advocacy Speech.

The Eleventh Circuit also held that the PROTECT Act is unconstitutionally overbroad because "[t]he First Amendment plainly protects speech advocating or encouraging or approving of otherwise illegal activity, so long as it does not rise to 'fighting word' status." *Williams*, 444 F.3d at 1298, citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, the PROTECT Act does not in any way criminalize advocacy speech, and the Eleventh Circuit misunderstands the statute to the extent it found otherwise.

In *Brandenburg*, this Court held that advocacy of racial violence, although repugnant, is protected by the First

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F.3d 1222, 1227 (11th Cir. 2002), *cert. denied*, *Root v. U.S.*, 537 U.S. 1176 (2003); and *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001)).

Amendment so long as it does not immediately incite violence or other criminal activity. *Id.* The conduct proscribed by the PROTECT Act is a far cry from the advocacy speech at issue in *Brandenburg*.

Williams could have entered a public chat room and proclaimed, "I like child pornography," or "Legalize child pornography!" Had he done so, he would have had nothing to fear from the PROTECT Act. As the definite article "the" in the statute makes clear, the pandering provision applies only to those who intentionally advertise, promote, present, distribute, or solicit *particular* material or purported material. *See* 18 U.S.C. § 2252A(a)(3)(b) ("in a manner that reflects the belief . . . that *the* material or purported material is or contains" illegal child pornography). It does not touch one who encourages, promotes, or advocates the *idea* of child pornography or the general subject matter.

The Eleventh Circuit simply misread the statute. The statute does not proscribe advocacy speech, and therefore cannot be overbroad on that ground.

C. The PROTECT Act Does Not Ban A Substantial Amount of Protected Speech.

A statute is not overbroad merely because a court can imagine a scenario under which a statute bars protected speech. *E.g.*, *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-801 (1984). Instead, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). *See also Free Speech Coalition*, 535 U.S. at 255 ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a *substantial amount* of protected speech is prohibited or chilled in the process.") (emphasis added); *Osborne*, 495 U.S. at 112 (accord).

Had the Eleventh Circuit engaged in a proper overbreadth analysis, it would have considered the scope of unprotected

speech banned by the PROTECT Act and compared it to the scope of protected speech arguably banned (and would have then determined that the statute is *not* overbroad). The Eleventh Circuit did not undertake these steps at all, but instead pointed to a few unrealistic examples of protected speech that, in fact, the statute clearly does not prohibit.

The pandering provision does not in any way dictate what a person may "see or read or speak or hear." *Free Speech Coalition*, 535 U.S. at 245. It does not, in and of itself, prohibit a person from producing or possessing real *or* computer-generated child pornography (or, for that matter, any other material). Instead, it prohibits only *conduct* – specifically, offers to distribute or trade in illegal child pornography or material that purports to be illegal child pornography. 18 U.S.C. § 2252A(a)(3)(B).[9] That conduct, as stated above, expands the network for child pornography.

Nor does the statute preclude an offer to transact in virtual pornography where the panderer is clear that the offered material is not real. Had Williams advertised, "The attached item is virtual pornography – looks like the real thing," he could not be prosecuted under the PROTECT Act, because no reasonable person would conclude that Williams was offering to exchange *real* child pornography, that he believed the material was made with flesh-and-blood children, or that he intended anyone else to believe so. No reasonable person would conclude that Williams was offering to transact in anything other than *virtual* items, which, however harmful they may be, are, under this Court's

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[9] Because the statute does not preclude "pure speech," the overbreadth doctrine has less application here. The doctrine's "function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct – even if expressive – falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615.

decision in *Free Speech Coalition*, protected by the First Amendment.

In the same manner, the PROTECT Act's pandering provision has no bearing on works of art, such as the movies *Traffic* or *American Beauty* discussed in *Free Speech Coalition*. A theater or video rental establishment that promotes the movies as the works of art that they are has nothing to fear. Granted, a person who promotes images from these movies *as purported child pornography*, and thereby expands the network for unprotected speech, may be prosecuted under the PROTECT Act. The distributor would not be prosecuted for his belief or the nature of the materials, however, but rather for his conduct – his intentional offer to transact in illegal child pornography or purported illegal child pornography.

Likewise, a proud parent can confidently send baby pictures to friends and relatives without any concern for the PROTECT Act's reach, no matter how unintentionally ambiguous the description of the pictures. The Eleventh Circuit posed a hypothetical (as part of its vagueness analysis) that it obviously considered problematic. When dissected and applied to the statute as properly read, the hypothetical poses no First Amendment difficulty.

The hypothetical was this: "Suppose, for example, the government intercepts an email claiming that the attached photographs depict 'little Janie in the bath – hubba, hubba!" *Williams*, 444 F.3d at 1306. The Eleventh Circuit further posited that the attached pictures were not illegal child pornography, but instead were "innocent baby-in-the-bubbles snapshots or candid stills of the family Rottweiler in a No. 10 washtub . . . ." *Id.* The sender of this email has not violated any reasonable construction of the statute. The Eleventh Circuit's hypothetical is, with respect, rather silly because it never gets past the first element of the crime: *"knowingly."* Only a person who *intends* to offer to transact in illegal material violates the statute. No reasonable person could

conclude that the sender in the hypothetical has offered to transact in child pornography.

The Eleventh Circuit suggested another hypothetical. No need to worry there, either:

> Let us consider, for example, an email entitled simply "Good pics of kids in bed." Let us also imagine that the "pics" are actually of toddlers in footie pajamas, sound asleep. Sender One is a proud and computer-savvy grandparent. Sender Two is a chronic forwarder of cute photos with racy tongue-in-cheek subject lines. Sender Three is a convicted child molester who hopes to trade for more graphic photos with like-minded recipients.

Williams, 444 F.3d at 1306-07.

As in all of life, context matters. When a reasonable person considers the nature of the attachment, the relationship of the sender to the subject of the photograph, and the obvious intent of the sender, it is clear in the first two cases that the distribution is wholly innocent and that the sender is not at all offering to transact in unprotected material. It is equally clear that the sender in the third case has violated the PROTECT Act. The law is quite accustomed to considering the nuances of a situation in this manner. If all one knows is that one person shot and killed another man, the situation is ambiguous, but that does not mean that a murder/manslaughter statute is overbroad (or vague). When the layers of fact are peeled back, they may show that the shooter was a would-be thief, lying in wait for a helpless victim. Alternatively, the facts may show that the shooter was a police officer who pulled the trigger in self defense. One case is murder, one is not, even though facts overlap. Where intent is an element of a crime, as it is here, the statute may constitutionally apply to one sender with intent to transact in illegal child pornography, even though it

has no application to a distributor of the same photograph who clearly has no such intent.

In fact, the provision of the PROTECT Act at issue here does not prohibit or chill protected speech at all. Even if there might be isolated situations where protected speech is arguably proscribed, the statute is not unconstitutionally overbroad because the amount of protected speech that is covered is not "substantial" in relation to the statute's permissible scope. Any supposed overbreadth can and should be handled on a case-by-case basis. *See Ferber*, 458 U.S. at 773-774 (where "impermissible applications" of the statute are but "a tiny fraction of the materials within the statute's reach . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied"). There is therefore no call to apply the "strong medicine" of the overbreadth doctrine to this case. *See id.* at 769.

III. THE PROTECT ACT'S PANDERING PROVISION IS NOT UNCONSTITUTIONALLY VAGUE.

The Eleventh Circuit also held that the PROTECT Act's pandering provision is unconstitutionally vague. The court believed the statute to be "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed," and that the statute "requires a wholly subjective determination by law enforcement personnel" of what conduct is prohibited. *Williams*, 444 F.3d at 1306. The Eleventh Circuit is wrong on both counts.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). When a statute is vague, federal courts "have the power to adopt narrowing constructions of federal

legislation. Indeed, the federal courts have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos v. Barry*, 485 U.S. 312, 330-331 (1988) (citations omitted). *See also*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (construing the Protection of Children Against Sexual Exploitation Act to contain a scienter requirement).

In finding the statute vague, the Eleventh Circuit misread the statute by ignoring the effect of the word "knowingly." The court believed that "the 'reflects the belief' portion of the statute has no intent requirement," and that the statute does not require "specific intent to traffic in illegal child pornography." *Williams*, 444 F.3d at 1306-07. That simply is not true.

The pandering provision provides as follows:

> (a) Any person who –
>
> (3) ***Knowingly*** –
>
> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains –
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct;
>
> shall be punished as provided in subsection (b).

18 U.S.C. § 2252A(a)(3)(B) (emphasis added).

The term "knowingly" is set apart from the other sections of the statute so that it applies to each element of the crime. There is no reasonable construction of the statute under which "knowingly" would apply to some terms and not others. Therefore, if a person does not specifically intend to offer to transact in unprotected child pornography, he does not violate the statute. Instead of applying the *X-Citement Video* rule and construing the statute to require scienter in order to avoid a constitutional difficulty, the Eleventh Circuit did the opposite, engaging in interpretive gymnastics to read the scienter requirement *out* of the statute and to *create* constitutional difficulty.

The statute gives fair notice of what it prohibits: An intentional distribution or promotion of material in such a manner that a reasonable person would conclude either (i) that the sender considers it to be illegal child pornography, or (ii) that the sender intends for others to so believe. The sender is offering to traffic in unprotected goods and is expanding the network for child pornography. A person who is surprised that such conduct is illegal is not due any sympathy.

There is no indication that prosecutors are abusing their discretion in choosing their targets under the PROTECT Act or comparable state statutes. The amicus States are not aware of a single person who has been prosecuted for sharing pictures of his kids with friends and family. Of course they haven't, because both prosecutors and defendants know what the statute does and does not proscribe. It is no more vague than it is overbroad, and the Eleventh Circuit's decision to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, this Court should reverse the court of appeals' judgment.

Respectfully submitted,

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No. 06-694

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ASSOCIATION OF AMERICAN PUBLISHERS, INC.; COMIC BOOK LEGAL DEFENSE FUND; FREEDOM TO READ FOUNDATION; AND PMA, THE INDEPENDENT BOOK PUBLISHERS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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IN THE

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BRIEF OF *AMICI CURIAE*
IN SUPPORT OF RESPONDENT

STATEMENT

American Booksellers Foundation for Free Expression, Association of American Publishers, Inc., Comic Book Legal Defense Fund, Freedom to Read Foundation and PMA, the Independent Book Publishers Association submit this joint amicus brief in support of respondent, urging that this Court affirm the decision of the court below.[1] This brief is submitted upon the consents of counsel to the Government and respondent, filed with the Court herewith.

INTEREST OF THE *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute and sell books, magazines, videos, sound recordings, motion pictures, interactive games, and printed materials of all types, including materials that are scholarly, literary, artistic, scientific, and entertaining. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers.

As such, *amici* have a significant interest in preventing the imposition of unconstitutional Governmental limitations on the manner and

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[1] A description of the amici is attached as Appendix A.

Pursuant to Rule 37.6 of the Rules of the Court, counsel for the amici curiae discloses that they authored the brief in whole. No person or entity, other than Media Coalition, Inc., a trade association of which amici curiae are members or with which they are affiliated, and of which the parties in this action are not members, made a monetary contribution to the preparation or submission of the brief.

substance of their advertising and promotion of their First Amendment-protected communicative materials, both textual and visual.

Many of the *amici* have brought actions in both federal and state courts to assert the unconstitutionality of laws infringing on First Amendment rights. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *PSInet Inc. v Chapman*, 342 F.3d 227 (4th Cir. 2004), *aff'g* 167 F. Supp. 2d 878 (W.D. Va. 2001); *American Booksellers Fdn. v. Dean*, 342 F.3d 86 (2d Cir. 2003), *aff'g* 202 F. Supp. 2d 300 (D. Vt. 2002); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), *aff'g* 4 F. Supp. 2d 1029 (D.N.M. 1998); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993).

They also have filed amicus briefs in this Court to advise it as to the impact of its decisions with respect to regulation of sexually frank speech on mainstream creators, producers, distributors, and retailers. *See, e.g., City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004); *City of Los Angeles v. Alameda Books, Inc.*, 536 U.S. 921 (2002); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *United States v. Playboy Entm't Group*, 529 U.S. 803 (2000); *Denver Area Educ. Telecomms. Consortium v. F.C.C.*, 518 U.S. 727 (1996); *United States v. X-Citement Video*, 513 U.S. 64 (1994).

INTRODUCTION AND SUMMARY OF ARGUMENT

The statute at issue in this case, 18 U.S.C. § 2252A(a)(3)(B) (the "Marketing Provision"), criminalizes the marketing of First Amendment-protected material if the marketing "reflects the belief" or "is *intended* to cause another to believe" that the material marketed or promoted is child pornography.[2] On its face, as the court of appeals found, the statute allows for the imposition of liability based on speech that falls outside any heretofore recognized category of unprotected speech even in the absence of a finding that the material being marketed actually is child pornography. This overbreadth presents a serious threat to *amici*'s legitimate, everyday marketing and promotional activities.

Amici do not produce, market or promote child pornography. Indeed, they support criminalizing the advertising and promotion of child pornography, which is and should be illegal. But they are deeply concerned that the Marketing Provision criminalizes the truthful marketing and promotion of legal, protected communicative materials. By targeting marketing speech based on an assessment of its subjective intent without regard to the legality of the speech being marketed, the Government seeks to criminalize otherwise lawful speech in order to control the dissemination of unlawful speech (child

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[2] *Amici* adopt the discussion of the unconstitutional vagueness of this language in the amicus brief of the National Coalition Against Censorship ("NCAC").

pornography). This Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002), already has held that it is unconstitutional to "suppress lawful speech as the means to suppress unlawful speech" – a proscription violated even more clearly here, where criminal sanction can be imposed even when the marketed material is not, in fact, child pornography. Through the Marketing Provision, the Government seeks, by targeting marketing, to circumvent constitutional protections of speech which it does not like and wishes to ban.

The First Amendment protects not only the right to create and publish protected speech, but also the right to distribute and sell such speech. *Amici's* ability to market the mainstream books, periodicals, and DVDs they produce and sell is integral to the full exercise of their First Amendment rights. Like the sound of the proverbial tall tree that falls to the ground in an uninhabited forest, the truths, beauty and entertainment contained in unread books, magazines and comic books or in unseen motion pictures and photographs are in some sense nonexistent. Marketing is an essential aspect of *amici's* exercise of their First Amendment rights.

In 2006, over 150,000 new books were published in the United States, and multiples of that number are in print; over 19,000 magazine titles were published weekly, monthly and quarterly in the United States and Canada; and over 74,000 DVD titles were in release. Advertising and promotion, including print ads, press releases, packaging, descriptions on the book cover and point-of-sale materials are the primary means by which these items are distinguished in the marketplace.

As common experience demonstrates, the sale of books, periodicals and DVDs in brick-and-mortar retail establishments is heavily dependent on browsing and perusing the marketing and promotional matter on the packaging of or adjacent to the work,[3] as well as advertisements, press releases and other promotional activity. Even more importantly, as the Internet grows as a sales medium, when considering whether to purchase books, periodicals or videos online, customers generally make their selection based on marketing material.

The Government seeks to allay the concerns of those who produce and market mainstream materials by referring to the Marketing Provision as a "pandering" provision despite the fact that the word "pander" or "pandering" does not appear in the statute. The dictionary definition of "pander" is "to cater to the lower tastes and desires of others or exploit their weaknesses." *Webster's New Collegiate Dictionary* 850 (9th ed. 1984). The example given by the dictionary is from the author Herman Wouk: "the audience is vulgar and stupid; you've got to pander to them." Describing marketing as pandering reflects a view that it (or that which is being marketed) is tasteless, vulgar or catering to "lower tastes." It is the marketing of that of which one disapproves. The Government states (without any supporting citation) that "there is no per se protection for pandering." (U.S. Brief at 37.) But marketing or other speech

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[3] DVDs are shrink-wrapped and generally do not permit review of their content; in some retail establishments books and periodicals are also shrink-wrapped.

that "caters to the lower tastes and desires of others or exploits their weaknesses" is presumptively protected unless it falls within one of the narrow categories of unprotected speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

The concerns expressed by *amici* extend beyond this case. The various theories by which the Government seeks to establish the constitutionality of the Marketing Provision in the child pornography context would be equally applicable to support a statute criminalizing marketing which someone might consider "reflects the belief" or "is intended to cause another to believe" that the product marketed is obscene or harmful to minors. The world of communications and ideas, like life itself, is inextricably entwined with human passion and sexuality. Many serious works of fiction appearing in book, periodical, or DVD form contain sexually forthright material that is not obscene but may offend some adults who personally equate sexual forthrightness with obscenity. If the Marketing Provision is upheld in this case, a similar provision could be added to laws banning obscenity. A publisher or DVD movie producer would, at the risk of a long sentence of incarceration, have to carefully choose the marketing language it uses so that third parties -- and particularly prosecutors -- could not suggest that the marketing or description "reflects the belief" or "is intended to cause another to believe" that the material is obscene. This would be true even if that is not the marketer's intent and even if the work is not obscene. The substantial chilling effect of this subjective test is not mitigated by the Government's suggestion that the marketing will be

judged in the context of the other facts — yet another level of subjectivity.

Ginzburg v. United States, 383 U.S. 463 (1966), provides no support for criminalizing the truthful marketing of protected materials. Nor, as noted, can protected speech be criminalized as a vehicle to discourage unprotected speech. In addition, the Marketing Provision is a content-based regulation of protected speech. The governmental interest supporting such regulation has previously been found by the Court not to be compelling, *Free Speech Coalition*, 535 U.S. at 254, nor is it substantial. Thus the regulation fails under both strict and intermediate scrutiny.

ARGUMENT

I.

GINZBURG AND ITS PROGENY PROHIBIT THE CRIMINALIZATION OF NON-OBSCENE, TRUTHFUL MARKETING

The First Amendment protects both non-commercial and commercial speech that constitutes truthful marketing of lawful activity. The Marketing Provision is an improper criminalization of speech that the government concedes may, in and of itself, be truthful and non-obscene in order to combat the dissemination of child pornography. (*See, e.g.*, U.S. Brief at 28-29.)

As the Eleventh Circuit properly found, the Marketing Provision unconstitutionally criminalizes speech that is protected by First Amendment. *See*

United States v. Williams, 444 F.3d 1286 (11th Cir. 2006). Under the statute, it is a felony punishable by up to twenty years in prison to "advertise" or "promote" "any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains [child pornography]." 18 U.S.C. § 2252A(a)(3)(B). These severe penalties are imposed without regard to the actual nature, or even the existence, of the underlying material. *See Williams*, 444 F.3d at 1298-99. There can be no reasonable basis for imposing a twenty-year sentence for marketing lawful materials.

The statute is not narrowly drawn to sanction only commercial speech that is false or that proposes an illegal transaction. Instead, it extends to commercial and non-commercial speech even if such speech constitutes non-obscene, truthful marketing of lawful activity.[4] The Marketing Provision also

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[4] In addition, despite the Government's attempt to rewrite the statute to require specific intent, (*see* U.S. Brief at 32), as the Eleventh Circuit aptly noted: "[T]he law does not require the pandered material to contain any particular content nor, in fact, that any 'purported' material need actually exist. Since the 'reflects the belief' portion of the statute has no intent requirement, the government establishes a violation with proof of a communication that it deems, with virtually unbounded discretion, to be reflective of perverse thought." *Williams*, 444 F.3d at 1306 (emphasis added); *see also id.* at 1298 ("[T]hat pandered child pornography need only be 'purported' to fall under the prohibition ... means that promotional or[sic] speech is criminalized even when the touted materials are clean or non-existent.").

punishes marketing that while not false may be viewed by some as puffery,[5] exaggeration, sarcasm, in poor taste or a mistaken belief. If upheld, the same framework readily could be applied to marketing of other unpopular protected speech that could not otherwise be subject to regulation or sanction.

As retailers, publishers, distributors, and users of mainstream, non-obscene material, *amici* have a direct interest in ensuring that the Court does not uphold the vague and overbroad statutory scheme at issue here. While the Marketing Provision before the Court has been added to a child pornography law, the rationale behind it could equally apply to support the addition of similar marketing crimes to laws restricting obscenity and material harmful to minors.

The Marketing Provision represents, in effect, an unwarranted and unconstitutional extension of *Ginzburg*. In that case, the Court narrowly held that "in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the Roth test." 383 U.S. at 474. *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 239 n.1 (1990):

> In *Ginzburg*, this Court held merely that in determining whether a given publication was obscene, a court

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[5] The Court has quoted the FTC as stating, in the context of civil regulation, "mere puffing deceives no one and has never been subject to regulation." *California Dental Ass'n* v. *F.T.C.*, 526 U.S. 756, 778 n.14 (1999).

> could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale and advertising. ... [T]here is no "obscenity vel non" question in this case.

Since *Ginzburg*, the Court has extended First Amendment protection to commercial speech and has made it clear that truthful, non-obscene material cannot be deemed obscene simply based on the manner by which it is advertised or marketed. *See e.g., United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 829 (2000) (Stevens, J., concurring) ("The very fact that the programs marketed by Playboy are offensive to many viewers provides a justification for protecting, not penalizing, truthful statements about their content.").[6] Thus, truthful and non-obscene marketing of protected material may not be criminalized on the ground that it is done in a "manner that reflects the belief, or that is intended to cause another to believe" that the material is child pornography, obscene, or "harmful to minors."

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[6] The Eleventh Circuit also recognized that "although *Ginzburg* has not been overturned its precedential value is questionable," noting Justice Stevens' dissent, joined by four justices, in *Splawn v. California*, 431 U.S. 595, 603 n.2 (1977), and his concurrence in *Playboy Entm't Group, Inc.*, 529 U.S. at 829 ("since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is 'anachronistic.'"). *Williams*, 444 F.3d at 1301.

The Government's attempt to broaden the Court's holding in *Ginzburg* in a manner that would threaten to impose such severe penalties on persons engaging in First Amendment-protected speech, thereby chilling such speech, should be rejected.

A. Truthful Non-Obscene Statements Concerning Lawful Activity Are Fully Protected By The First Amendment

Section 2252A(a)(3)(B) directly criminalizes First Amendment-protected advertising and promotion. In so doing, it also indirectly restricts the protected books, periodicals and DVDs whose marketing is chilled by the possibility of a lengthy jail term. The Government claims that "[t]here is no per se protection for pandering," (*id.* at 37), but this is not true. First, the statute criminalizes speech that "advertises" and "promotes" — not that which "panders" (a term that does not appear in the statute). Truthful marketing of lawful activity — whether for commercial or non-commercial purposes — is fully protected under the First Amendment. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976). Second, even if the statute can be interpreted to criminalize only pandering, as that term has been interpreted by the Court, the Court has never held "pandering" to be unconstitutional. *See Pinkus v. United States*, 436 U.S. 293, 303 (1978) ("Pandering is 'the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'") (quoting *Ginzburg*, 383

U.S. at 467). Under *Ginzburg* and its progeny, all the Court has found is that in "close cases," evidence of pandering may be probative in determining whether the underlying material in question is constitutional. *See Ginzburg*, 383 U.S. at 474; *FW/PBS*, 493 U.S. at 239, n.1 (1990) ("What *Ginzburg* did not do, and what this Court has never done ... is to abrogate First Amendment protection for an entire category of speech-related businesses.").

If such a regulation of marketing were held to be constitutional, publishers and retailers, including *amici*, would have to review all marketing materials, including advertisements and promotional information typically provided on the covers of books or DVDs, and attempt to determine whether the material might appeal to the "salaciously disposed," *Ginzburg*, 383 U.S. at 472, even when the underlying work clearly is not child pornography. For example, consider the promotional speech on the packaging of the DVD of "Hustle & Flow," a film that received the 2005 Sundance Film Festival Award and was nominated for multiple Academy Awards. The advertisement talks of the "unforgettable tale of DJay (Terrance Howard), a pimp whose gritty hustle selling sexy Nola ... and supporting pregnant Shug ... leaves him wondering if this is it for him." Consider further the promotional speech on the DVD cover of the film "Cruel Intentions" that talks of the "ultimate challenge to ... deflower the headmaster's beautiful, virgin daughter," played by Academy Award winner Reese Witherspoon.[7] Could some read

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[7] The movie is the most recent film interpretation of the well known de Laclos novel "Les Liaisons Dangereuses."

these promotional descriptions as reflecting a belief that the motion pictures are obscene or involve adolescents engaging in sexual activity? Possibly. Does that make the movies or the promotional language unprotected? Certainly not.

The Government states that the Marketing Provision "could not ensnare" marketing of mainstream literature or movies because the Government knows that the publishers and producers of such mainstream materials "do not intend" their materials to violate federal law. (U.S. Brief at 41.) Although that statement is correct as *amici's* products are neither obscene nor child pornography, a prosecutor or complainant nevertheless may conclude that in his or her subjective view the marketing reflects a belief that they are, which the Marketing Provision makes a felony. Nor is it much solace to mainstream media entities that run afoul of such a misguided prosecutor or complainant that "[t]o the extent that ... [the Marketing Provision] sweeps within its ambit protected speech, any such application can be avoided by case-by-case adjudication." (*Id.* at 42.) The fear of having to confront such charges can itself give rise to a chilling effect.

If the Marketing Provision is upheld, a similar statutory scheme undoubtedly could be used to regulate and chill the marketing and distribution of First Amendment-protected sexually frank and other governmentally-disfavored material. First Amendment rights should not be limited by a prosecutor's surmise as to the intent of a publisher or retailer, particularly when the underlying material is lawful. The protected speech of *amici* and others

similarly situated should not be chilled by the fear of criminal prosecution for the sexually frank or titillating marketing of mainstream publications and films.

B. Regulation Of Protected Speech May Not Be Used As A Vehicle To Discourage Unprotected Speech

As the Court stated in *Free Speech Coalition*:

> The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse. '[T]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted . . .' [citation omitted] The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.

535 U.S. at 255.

While *amici* strongly support combating the distribution of child pornography, this cannot be done by criminalizing First Amendment-protected communication. The Marketing Provision impermissibly criminalizes not only false, but also

fully protected truthful marketing of lawful activity. Criminalizing marketing that describes sexually frank or racy, but not unlawful, material may not be used as a means of combating the dissemination of other material that is, in fact, unlawful. As the Court held in *Free Speech Coalition* with respect to a similar statutory provision:

> Even if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that the scenes would be found in the movie. The determination turns on how the speech is presented, not on what is depicted. While the legislative findings address at length the problems posed by materials that look like child pornography, they are silent on the evils posed by images simply pandered that way.

535 U.S. at 257.

The Marketing Provision is, in effect, an attempt to circumvent that ruling by taking protected promotional language, combining it with protected material, and somehow ending up with unprotected marketing. That result is insupportable.

As the Court has found, "[t]he First Amendment assumes that, as a general matter, 'information is not in itself harmful, that people will perceive their own best interests if only they are well

enough informed, and that the best means to that end is to open the channels of communication rather than to close them.'" *Playboy Entm't Group, Inc.*, 529 U.S. at 829 (Stevens, J., concurring) (quoting *Virginia Bd. of Pharmacy*, 425 U.S. at 770).

II.

THE MARKETING PROVISION IS A CONTENT-BASED REGULATION OF PROTECTED SPEECH WHICH DOES NOT PROMOTE EITHER A COMPELLING OR SUBSTANTIAL GOVERNMENT INTEREST

Because the Marketing Provision applies to First Amendment-protected sexually frank speech, the Marketing Provision plainly is content-based. To the extent that the communicative product marketed is not child pornography, it is content-based regulation of protected speech. As a content-based speech restriction applying to non-commercial as well as commercial speech, the Marketing Provision is "presumptively invalid," *R.A.V.*, 505 U.S. at 382, and "can stand only if it satisfies strict scrutiny." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). "If a statute regulates [non-commercial] speech based on its content, it must be narrowly tailored to promote a compelling Government interest." *Playboy Entm't Group, Inc.*, 529 U.S. at 813. *See also Williams*, 444 F.3d at 1298. Even if the Marketing Provision were limited to commercial speech, under the *Central Hudson* test it is unconstitutional unless the government assert[s] a substantial interest in support of the regulation," "demonstrates that the restriction on commercial

speech directly and materially advances the interest" and draws the regulation narrowly. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995).

As the Eleventh Circuit noted, "[i]f all that the pandering provision stood for was that individuals may not commercially offer or solicit illegal child pornography nor falsely advertise non-obscene material as though it were, the Government need not show that it has narrowly tailored its restriction because neither of these scenarios involve protected speech." *Williams*, 444 F.3d at 1297. However, as set forth above, the statute is not so limited. The Marketing Provision applies to both commercial and non-commercial speech — to persons and non-profit entities as well as business. *Cf. Ashcroft v. ACLU*, 535 U.S. 564, 568 (2000).

While *amici* do not dispute that marketing which is false can be regulated, there already are numerous federal and state laws, both civil and criminal, aimed at protecting consumers from such fraud.[8] *See also Williams*, 444 F.3d at 1297. Those which are criminal, however, are almost exclusively misdemeanors or less, and counsel has found none that are based on the protected communicative content of the item which is being marketed. Further, counsel has been unable to find any statute where the penalties for illegal advertising or

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[8] *See, e.g.*, 18 U.S.C. § 709 (falsely advertising to imply federal government relationship; misdemeanor); Fla. Stat. Ann. §§ 817.06, 817.44 (general application; misdemeanor); N.Y. Gen. Bus. L. §§ 350, 350-d (general application; civil penalty up to $5,000).

promotion are even close to the lengthy jail sentences imposed for violation of the Marketing Provision. *See also Williams*, 444 F.3d at 1297 ("[W]e note that a mere false commercial advertiser is punished on par with an actual child pornographer, without regard to the actual content or even existence of underlying material."); Tribe, *American Constitutional Law* 814 (2d ed. 1988) ("If the first amendment requires an extraordinary justification of government action which is aimed at ideas or information that government doesn't like, the constitutional guarantee should not be avoidable by governmental action which seeks to attain that unconstitutional objective under some other guise.").

In the case before the Court, the Government puts forward as the governmental interest justifying the Marketing Provision the "drying up the market for child pornography and thus removing an incentive to create it." (U.S. Brief at 12.) That is the very same compelling interest that was offered by the Government in *Free Speech Coalition* where it was described by the Court as the "market deterrence theory" and rejected as insufficient to permit restriction of protected speech on the ground that there was "no underlying crime at all." 535 U.S. at 254. That analysis applies equally here and requires the rejection of the advanced Government interest. Because the Marketing Provision promotes no compelling governmental interest, the content-based Marketing Provision fails strict scrutiny and is unconstitutional to the extent it purports to apply to the non-commercial promotion of legal, protected materials. Even if the Marketing Provision were limited to commercial speech, it then would not

directly and materially advance that proposed Government interest and therefore would fail intermediate scrutiny. The Government has failed to demonstrate that the restriction will "in fact alleviate ... [the harm that underlies the government's interest] to a material degree." "This burden is not satisfied by mere speculation or conjecture." *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. 173, 188 (1999) (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993).

As the Court has often stated:

> [I]t bears repeating, as we did in *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U.S., at 448-449, 111 S.Ct., at 1444-1445. The First Amendment presumptively places this sort of discrimination beyond the power of the government. As we reiterated in *Leathers*: " 'The constitutional right of free expression is ... intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us ... in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.'"

Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991).

As the Court pointed out in *Simon & Schuster* with respect to New York's "Son of Sam" law, "[i]t singles out income derived from expressive activity for a burden the state places on no other income, and is directed only at works with a specified content." *Id.* The same is true of the Marketing Provision. It singles out marketing of expressive activity for a burden that the Government places on no other product and is directed only at speech on the basis of specified content. While *Simon & Schuster* related to financial regulation, the chilling effect of the possibility of many years in a federal penitentiary is even more likely to drive disfavored ideas or viewpoints from the marketplace than monetary burdens.

CONCLUSION

For the reasons set forth above, *amici* respectfully urge the Court to affirm the decision of the Eleventh Circuit Court of Appeals that the Marketing Provision is unconstitutional.

Dated: August 14, 2007

Respectfully submitted,

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APPENDIX

APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Association of American Publishers, Inc. ("AAP") is the national association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Comic Book Legal Defense Fund ("CBLDF") is a non-profit corporation dedicated to defending the First Amendment Rights of the comic book industry. CBLDF, which has it principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

The Freedom To Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

PMA, the Independent Book Publishers Association ("PMA") is a nonprofit trade association representing more than 3,700 publishers across the United States and Canada. PMA members publish and distribute mainstream books on a variety of topics including marriage, sex education, family and relationships, self help, art photography, glamour photography, photo techniques, as well as erotic fiction and romance novels.

FILE DATE: 06-11-07

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No. 06-694

IN THE

Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

MICHAEL WILLIAMS, *Respondent*.

On Writ of Certiorari to the
United States Court of Appeals for Eleventh Circuit

AMICUS BRIEF FOR THE AMERICAN CENTER FOR LAW AND JUSTICE AND EIGHTEEN MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI*

The American Center for Law and Justice (ACLJ) is a public interest law firm committed to insuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued or participated as amicus curiae in numerous cases involving constitutional issues before this Court and lower federal courts, and Chief Counsel Jay Alan Sekulow has presented oral argument before this Court eleven times.

The ACLJ is dedicated to defending families against efforts to undermine their importance, integrity, and well-being. Moreover, the ACLJ is committed to supporting appropriate efforts by Congress and the States toward the creation and sustenance of a social order that supports the important work of families: the rearing and protection of children. The proper resolution of this case is a matter of substantial organizational concern to the American Center for Law and Justice because of the ACLJ's commitment to American families.

This brief is also filed on behalf of Senator Tom Coburn and Representatives J. Gresham Barrett, Marsha Blackburn, Tom Cole, John Culberson, John Doolittle, Tom Feeney, Luis G. Fortuno, Trent Franks, Virgil H. Goode, Bob Inglis, Sam Johnson, Steve King, Joseph R. Pitts, Lamar Smith, Timothy Walberg, Dave Weldon, and Lynn A. Westmoreland.

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* The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party in this case authored in whole or in part this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

These amici currently are members of the United States Senate and House of Representatives in the One Hundred Tenth Congress. The Senator and these Representatives believe that the court of appeals in *United States v. Williams*[1] misinterpreted the pandering provision of the PROTECT Act, and therefore urge this Court to reverse the decision below.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Eleventh Circuit erred in holding that the pandering provision of the PROTECT Act sweeps in noncommercial speech. Calling the online trading of child pornography "noncommercial," the court ignored the commercial essence of pandering, as well as this Court's precedents holding that determinations of whether speech is commercial must focus not on formulas but on the content and goal of the speech.

The framers of the Commerce Clause recognized bartering and trading as commercial endeavors. Accordingly, offers to swap, barter or sample child pornography are commercial speech. They are all focused on either present or future quid pro quo transactions like the one that occurred in this case, and like thousands of others that happen daily in the underworld of online child pornography. Even free offers to view child pornography perpetuate the market for this highly addictive substance, much like offers of free cigarettes bolster the market for tobacco products. Any effective effort to dry up the market for child pornography must encompass pandering speech that offers samples or trades.

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[1] 444 F.3d 1286 (11th Cir. 2006).

The court of appeals' decision construing the pandering provision of the PROTECT Act as a restriction on noncommercial speech also violates the canon of constitutional avoidance. This Court's precedents require Congressional enactments to be interpreted to avoid constitutional difficulties. Ignoring the plainly stated purposes of the pandering provision, the court of appeals imagined hypothetical scenarios under which the pandering provision might restrict the political advocacy of pedophilia or child pornography. Congress's purpose for the pandering provision was to combat trafficking in child pornography by punishing those who pander it. The provision has no bearing on promotional speech that does not sink to the level of pandering. Properly construed to avoid constitutional questions, the pandering provision is a restriction on commercial speech alone.

The court of appeals further erred in holding that misleading panders are noncommercial speech protected by the First Amendment. This Court has never held that false statements of fact about unlawful activity are protected speech, any more than false advertising in other contexts. Untrue statements offering or promoting materials as obscene or actual child pornography find no refuge in the First Amendment, and it does not matter whether the speaker is mendacious or deluded about the nature or existence of the materials.

Because the pandering provision is a restriction on commercial speech, the Court of Appeals erred in subjecting the pandering provision to overbreadth analysis. The pandering provision passes constitutional muster under this Court's commercial speech cases because it is narrowly drawn to serve the compelling governmental interest in eradicating the market for child pornography.

ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT WRONGLY HELD THAT THE PANDERING PROVISION OF THE PROTECT ACT RESTRICTS NONCOMMERCIAL SPEECH.

At the heart of the court of appeals' judgment striking down the pandering provision of 18 U.S.C. §2252A(a)(3)(B)[2] was the erroneous conclusion that the pandering provision restricts noncommercial speech. 444 F.3d at 1298. The court imported a noncommercial gloss to the terms of the statute even though those terms are commonly associated with commercial activity, and Congress clearly intended them to have a commercial meaning alone. In ruling that the pandering provision sweeps in noncommercial speech, the court adopted an unduly narrow view of "commercial speech" that ignores the

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[2] The pandering provision of the PROTECT Act provides that any person who knowingly

> (B) advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains
>
> --
>
> (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
>
> (ii) a visual depiction of an actual minor engaging in sexually explicit conduct

commits a criminal offense. 18 U.S.C. § 2252A(a)(3)(B).

transactional reality of child pornography on the Internet and lacks support in this Court's precedents. Because the court erred in holding that §2252A(a)(3)(B) sweeps in noncommercial speech, it mistakenly applied the overbreadth doctrine to the statute.

A. The Court of Appeals Erred in Viewing the Offers to Trade Sexually Explicit Materials as Noncommercial Speech.

As occurred in this case, child pornography is often traded and exchanged on the Internet in addition to being bought and sold.[3] The court of appeals wrongly reasoned from this fact that such trafficking is noncommercial activity. The court referred to the "non-commercial setting, in which most child pornography is discussed and exchanged . . ." 444 F.3d at 1304. The court held that the pandering provision of the PROTECT Act extended to the "non-commercial promotion, presentation, distribution, and solicitation" of child pornography. *Id.* at 1298.

From the founding, commerce has always included trade and barter. The Framers of the Commerce Clause understood bartering and trading as commercial activity.

> At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary of the English

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[3] Offers to trade sexually explicit pictures of children is common practice in the underworld of Internet pornography. *See* L. Jill Rettinger, *The Relationship between Child Pornography and the Commission of Sexual Offences against Children: A Review of the Literature* (March 2000), *available at* http://www.justice.gc.ca/en/ps/rs/rep/2000/rr00-5.html.

> Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another, interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com – "with", merci – "merchandise"). In fact, when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably

United States v. Lopez, 514 U.S. 549, 585-86 (1995) (Thomas, J., concurring); *see also Gonzales v. Raich*, 545 U.S. 1, 58 (2005) (O'Conner, J., dissenting) (the term "'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes").

Although there is much debate regarding how broad or narrow the term "commerce" should be interpreted, most scholars agree that "commerce" includes trade and exchange. *See* Randy Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 116 (2001) ("[H]aving examined every use of the term 'commerce' that appears in the reports of the state ratification conventions, I found that the term was uniformly used to refer to trade or exchange"); Grant S. Nelson and Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 101 n.478 (1999)

(noting that "trade and exchange" is the core meaning of "commerce").

The Internal Revenue Service views bartering as taxable commercial activity. Specifically, income from bartering is taxable in the year in which the goods or services are received. The fair market value of goods and services exchanged must be included in the income of both parties. *See, e.g.*, Rev. Rul. 80-52, 1980-1 C.B. 100 (citing 26 USCS § 61).

The trading or swapping of sexually explicit pictures of minors is commercial activity no less than the trade of any other commodity. The same quid pro quo exchange occurs whether the currency is cash or in-kind goods and services. Congress enacted the pandering provision of the PROTECT Act to combat attempted quid pro quo transactions in child pornography. Prohibiting the attempted bartering of pornographic images on the internet is crucial in "dry[ing] up the market" for child pornography, which this Court recognized as a compelling interest in *New York v. Ferber*, 458 U.S. 747, 760 (1982).

Pandering is therefore, at its core, commercial speech. This Court has defined "pandering" as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers." *Pinkus v. United States*, 436 U.S. 293, 303 (1978) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)). Thus, whether it involves prostitution or sexually explicit materials, the goal of those who pander is to propose a present or future commercial transaction.

The essence of commercial speech is "speech proposing

a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980). The Court has not limited commercial speech, however, to purchase and sales offers, but also has included speech that promotes the goal of a future transaction. Thus, statements about a product, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995), and about professional qualifications, *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 142 (1994), qualify as commercial speech. In *Bolger v. Youngs Drug Products Corporation*, 463 U.S. 60 (1983), the Court held that promotional advertisements for contraceptives were commercial speech even though they did not specifically propose a commercial transaction. Finding that the materials were advertisements that referred to a specific product and that the sender had an economic motivation for sending them was sufficient to support the conclusion that the promotional ads were commercial speech. *Id.* at 66-68. The Court further added that it did not "mean to suggest that each of the characteristics present in this case must necessarily be present in order for speech to be commercial." *Id.* at 68.

Thus, this Court has resisted rigid formulas in defining commercial speech, looking instead at the content and context of the speech in determining its commercial character. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) ("ambiguities may exist at the margins of the category of commercial speech"); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993) (recognizing "the difficulty of drawing bright lines that will clearly cabin commercial speech in a distinct category").

Because trading or swapping sexually explicit images is essentially commercial activity, the Court's precedents defining commercial speech support the conclusion that the

pandering provision of § 2252A(a)(3)(B) restricts commercial speech alone, even if no money ever changes hands. The pandering provision bars offers to buy, sell, trade, or sample child pornography, all of which help drive the market. In light of the way pedophiles and traders in child pornography collections operate—through systems of trading and bartering for larger and "better" collections—even ads offering sexually explicit pictures for free are intended to draw pedophiles in, much like free food samples draw customers into restaurants, or more aptly, free cigarettes entice teenagers to smoke. The child pornography business is an addiction-driven business that is perpetuated by ensnaring the vulnerable with cost-free introductions.[4] It is naïve to think that free promotional offers of child pornography constitute noncommercial speech. The only kinds of persons engaged in the speech that Congress intended § 2252A(a)(3)(B) to proscribe are motivated by the hope of a present or future transaction to feed an insatiable addiction.[5]

B. The Court of Appeals Wrongly Held That the First Amendment Protects Misleading Statements About the Nature or Existence of Sexually Explicit Materials.

After concluding that § 2252A(a)(3)(B) restricts noncommercial speech, the court of appeals held that the pandering provision violated the First Amendment because it

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[4] Victor B. Cline, *Pornography's Effects on Adults and Children*, *available at* http://www.obscenitycrimes.org/clincart.cfm (last visited Apr. 17, 2007); R.J. McGuire, et al., *Sexual Deviation as Conditioned Behavior*, 2 Behavior Research and Therapy 1, 185 (1965).

[5] McGuire et al., *supra* note 4, at 185.

banned "noncommercial" offers or promotions of "purported" child pornography. 444 F.3d at 1298-1300, 1307. The court was concerned that the statute might punish statements offering virtual child pornography as real child pornography or innocent pictures of children as sexually explicit. 444 F.3d at 1306-07.

Offers of "purported" child pornography that is either "lawful," innocuous, or nonexistent are nothing more than misleading panders. They deserve no protection from the First Amendment. Indeed, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake." *Va. Pharm. Bd. v. Va. Consumer Council*, 425 U.S. 748, 771 (1976); *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (when speech "concerns no public issue" and is "wholly false and clearly damaging," it "warrants no special protection" under the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) ("There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.")

Whether careless, delusional, or intentional, false statements of fact about material that is represented as child pornography belong to that "category of utterances which are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

Thus, whether misleading panders of child pornography are viewed as commercial speech or noncommercial speech, they should not be protected under the First Amendment.

II. THE COURT OF APPEALS VIOLATED THE CANON OF CONSTITUTIONAL AVOIDANCE IN HOLDING THAT § 2252A(a)(3)(B) RESTRICTS NONCOMMERCIAL SPEECH.

Even if § 2252A(a)(3)(B) arguably could be interpreted to restrict some noncommercial speech, the court of appeals' decision to do so, in the face of a plausible, narrower construction, violated the canon of constitutional avoidance.

This Court has frequently recognized that a decision to declare an Act of Congress unconstitutional "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). A ruling of facial invalidity "frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 (2006). Thus, "the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS 4338, *52 (2007) (quoting *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Additionally, the statute should be interpreted so "as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Respect for Congress, and the presumption that Congress legislates in the light of constitutional limitations is the driving force behind the canon of constitutional avoidance. *Id.*

Applying the canon of constitutional avoidance often requires examining Congress's purpose for enacting the statute in question. For example, in *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), the Court held

that Congress's purpose in enacting an obscenity law would be frustrated if time limits for judicial review were not read into the law. *Thirty-Seven (37) Photographs* involved a facial challenge to a federal law prohibiting the importation of obscenity into the United States. The statute authorized customs officials to seize obscene materials but did not provide explicit time limits for prompt judicial review as required by this Court's previous precedent. *Id.* at 367.

Guiding the Court was the principle of constitutional avoidance: "when the validity of an act of the Congress is drawn in question, and . . . a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Id.* at 369.

Various statements made during Congressional debates demonstrated a clear concern for promptness of judicial review. *Id.* at 370. "Fidelity to Congress's purpose" therefore justified the Court's reading explicit time limits into the statute. *Id.* at 372. It was thus "possible to construe the section to bring it in harmony with constitutional requirements." *Id.* at 369; *see also Gonzales v. Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS 4338, *52 (2007) (canon of constitutional avoidance required Court to read abortion statute to exclude D&E abortions); *Nat'l Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (principle of constitutional avoidance warranted holding that Congress did not intend National Labor Relations Act to apply to teachers in religious schools, even though statute could legitimately be read to extend the law's jurisdiction over parochial school teachers, thereby raising serious concerns under the Religion Clauses); *Shapiro v. United States*, 335 U.S. 1, 32 (1948) ("well-settled doctrine" requires Court to interpret the terms of a statute "in the

manner which effectuates rather than frustrates the major purpose of the legislative draftsmen").

The principle of constitutional avoidance requires similar deference to Congress' clearly stated purpose in this case. Congress could not have been more clear that the pandering provision of 18 U.S.C. § 2252A(a)(3)(B) was intended to be a restriction on commercial speech. By enacting the pandering provision, Congress sought to "ban[] . . . the offer to transact . . . this unprotected material, coupled with proof of the offender's specific intent. Thus, for example, this provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography." S. Rep. No. 108-2, at 12 (2003).

Congress stressed that the pandering provision targeted those "who wish to traffic in child pornography," meaning "only those individuals who are seeking to obtain illicit child pornography, or those individuals who are attempting to profit from the real or purported sale of illicit child pornography." *Id.* at 10.

In its findings, Congress stated that the PROTECT Act's purpose was "to stamp out the vice of child pornography at all levels in the *distribution* chain." PROTECT Act of 2003, Pub. L. No. 108-21, § 501(2), 117 Stat. 650, 676 (2003) (codified as amended at 18 U.S.C. § 2251)) (emphasis added). Quoting this Court's decision in *New York v. Ferber*, 458 U.S. 747, 760 (1982), Congress also articulated the goal of "'dry[ing] up the *market* for [child pornography] by imposing severe criminal penalties on persons *selling, advertising, or otherwise promoting the product.*'" *Id.* at § 501(3) (emphasis added).

Despite this evidence that Congress sought only to

restrict commercial speech, the court of appeals read § 2252A(a)(3)(B) to prohibit noncommercial "promotion" of non-obscene sexually explicit material. Specifically, the court imagined the statute could be used to criminalize social or political advocacy of child pornography. 444 F.3d at 1301-02. In so doing, the court conferred a meaning on the words "promote," and "advertise" different than that intended by Congress, as evidenced by Congress's clear statements that the pandering provision was aimed at the commercial trafficking of child pornography. Both "promote" and "advertise" are commonly associated with commercial activity. *See, e.g., Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 361 (2002) (promoting of compounded drugs was commercial speech); *San Francisco Arts & Ath. v. United States Olympic Comm.*, 483 U.S. 522, 535 (1987) (use of the term "Olympic" in advertisements to promote goods, services and events, was commercial speech); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (informational advertisements for contraceptives were commercial speech).

This Court cautioned recently against an "antagonistic canon of construction under which . . . a permissible reading of a statute [is] to be avoided at all costs." *See Carhart*, 127 S. Ct. 1610, 2007 U.S. LEXIS at *53. The court of appeals' hypothetical musings about potential noncommercial applications of the pandering provision stand the canon of constitutional avoidance on its head. Unlike *Thirty-Seven (37) Photographs*, where new language was inserted into the law, all that is required here to save § 2252A(a)(3)(B) is that its terms be given their ordinary commercial meaning. Properly interpreted in accordance with the canon of constitutional avoidance, § 2252A(a)(3)(B) restricts commercial speech that panders child pornography.

III. UNDER THIS COURT'S COMMERCIAL SPEECH PRECEDENTS, § 2252A(a)(3)(B) POSES NO THREAT TO THE FIRST AMENDMENT.

As a restriction on commercial speech, §2252A(a)(3)(B) is appropriately analyzed under *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 566 (1980) and its progeny. "Commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

Thus, laws burdening commercial speech will be upheld if they directly advance a substantial governmental interest and are narrowly tailored to achieve the government's goal. *Central Hudson*, 447 U.S. at 566; *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634-35 (1995). The government is not limited in the evidence it may use to meet its burden. For example, a commercial speech regulation may be justified by anecdotes, history, consensus, or simple common sense. *Fla. Bar*, 515 U.S. at 628. Importantly, the overbreadth doctrine does not apply to restrictions on commercial speech. *Bd. of Trs. of State Univ. N.Y. v. Fox*, 492 U.S. 469, 477-81 (1978). The Eleventh Circuit therefore erred in applying the overbreadth doctrine to this case.

Section § 2252A(a)(3)(B) furthers a state interest of surpassing importance – protecting children from those who exploit them, including child molesters and child pornographers. *See New York v. Ferber*, 458 U.S. 747, 757 (1982); *Osborne v. Ohio*, 495 U.S. 103, 110 (1990) (stating

that the government's compelling interest extends to stamping out child pornography at all levels of the distribution chain). The most effective means of achieving the state's interest is to "dry up the market" for child pornography by "imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product." *Ferber*, 458 U.S. at 760.

A reasonable fit exists between § 2252A(a)(3)(B) and these compelling interests. The "narrowly tailored" standard does not require that the government's effort to protect substantial interests be the least restrictive measure available. All that is required is a proportional response. *Hudson*, 447 U.S. at 564-65; *Fox*, 492 U.S. at 480. The pandering provision directly advances the government's interest by criminalizing both online and off-line attempts to buy, sell, trade, or sample child pornography, all of which are core components of the market. To be effective, any measures aimed at the proliferation of online child pornography must necessarily target solicitations and offers to swap child pornography.

Properly construed, § 2252A(a)(3)(B) does not apply to the social or political advocacy of child pornography. The statute has nothing whatsoever to do with the right of groups like the North American Man-Boy Love Association to promote the (horribly misguided) view that pedophilia is acceptable.

In sum, § 2252A(a)(3)(B) is narrowly tailored to serve the most compelling of governmental interests. As a prohibition on the commercial speech of pandering, it is fully consonant with the First Amendment.

CONCLUSION

This Court should reverse the judgment of the Eleventh Circuit.

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In the Supreme Court of the United States

THE UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE FREE SPEECH COALITION AND FIRST AMENDMENT LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT

The Free Speech Coalition and First Amendment Lawyers Association submit this brief as *amici curiae* in support of Respondent and urge this Court to affirm the decision below by the Eleventh Circuit.[1] This brief is submitted with the consent of counsel for the Petitioner and Respondent, filed with the Court herewith.

INTEREST OF *AMICI CURIAE*

The Free Speech Coalition is a trade association that assists film makers, producers, distributors, wholesalers, retailers, and Internet providers located throughout the United States in the exercise of their First Amendment rights and in defense of those rights against censorship. Founded in 1991, the Free Speech Coalition currently represents several thousand businesses and individuals involved in the production, distribution, sale, and presentation of constitutionally-protected and non-obscene materials. The organization supports litigation against federal, state, and local incursions on free speech.

In 1997, the Free Speech Coalition initiated a constitutional challenge to the federal Child Pornography Prevention Act of 1996, asserting that the law's expanded definition of child pornography, which included material that "appear[ed] to be" or "convey[ed] the impression of" child

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae*, the Free Speech Coalition and First Amendment Lawyers Association, disclose that they authored this brief in its entirety. No person or entity, other than the Free Speech Coalition, its members, or its counsel have contributed to the costs of preparing and submitting this brief.

pornography, violated basic First Amendment principles of free speech. This complaint ultimately led to the Court's opinion in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), in which the two challenged provisions were struck down as constitutionally overbroad. The Court's decision in *Free Speech Coalition* is central to the instant constitutional challenge to 18 U.S.C. 2252A(a)(3)(B)(ii) and (ii) (Supp. IV 2004).

The First Amendment Lawyers Association ("FALA") is an Illinois-based, incorporated, not-for-profit association. Originally formed in the late 1960s, FALA now includes over 180 members. Its membership includes the most prominent First Amendment attorneys in the United States, covering virtually every state. FALA's members frequently litigate the constitutionality of statutory schemes that infringe upon the freedom of speech and artistic expression. Given the nationwide span of their experience and the focused nature of their practices, FALA attorneys are uniquely qualified to address the First Amendment harms inflicted by laws that intrude upon the freedom of expression.

The Free Speech Coalition and FALA do not advocate or tolerate the production or distribution of child pornography involving real children, and have assisted in the eradication of such materials through their organizational policies. Despite their strong opposition to child pornography, *amici* and their members and clients are nonetheless impacted by Section 2252A(a)(3)(B) because this provision prohibits large amounts of constitutionally-protected expression unrelated to actual child pornography.

Section 2252A(a)(3)(B) criminally captures the thoughts and beliefs that some individuals may have or express about constitutionally-protected materials, which do not depict, in

any way, actual children engaging in actual sexual activity. In so doing, Section 2252A(a)(3)(B) undermines the artistic, expressive, and constitutionally-protected interests of many of *amici*'s members and clients who are involved in the creation, production, and distribution of films and other art forms that address or include human sexuality. As with most forms of dramatic art, the essential mode of communication lies with the creation of a willing suspension of disbelief, a dynamic whereby viewers are transformed into believing, if only temporarily, that what is happening on the screen or within another visual medium is happening in reality. In other words, the primary artistic objective for many film makers and other creators represented by *amici* is to create a world of fantasy or "make believe."

Section 2252A(a)(3)(B) specifically targets this artistic process by placing criminal sanctions on an individual's communication of belief regarding artistic materials. Although the films and other art forms presented by *amici*'s members and clients are entirely protected forms of expression under the First Amendment, Section 2252A(a)(3)(B) disrupts and criminally sanctions constitutionally-protected communication about many of these materials. This legislative effort fundamentally dismantles the artistic process.

Accordingly, the Free Speech Coalition and FALA file this *amici* brief to protect and preserve the artistic and expressive interests of their members and clients and to ensure that the core tenets of this Court's decision in *Free Speech Coalition* are affirmed.

SUMMARY OF ARGUMENT

Section 2252A(a)(3)(B) is constitutionally overbroad because it captures vast amounts of constitutionally-protected material. The provision is not limited to simple acts of pandering, nor is it restricted to offers and solicitations of child pornography. Section 2252A(a)(3)(B) bars within interstate commerce all forms of advertising, promotion, presentation, distribution, and solicitation that reflect beliefs or cause beliefs about child pornography. In so doing, this provision snags the constitutionally-protected artistic methods used by movie producers and other dramatic creators, many of whom are seeking to create through their works a willing suspension of disbelief by viewers. Section 2252A(a)(3)(B) criminally sanctions this essential and longstanding artistic craft by prohibiting producers from conveying and causing certain beliefs about youthful sexuality.

Section 2252A(a)(3)(B) also captures large amounts of expression offered by other individuals, including movie reviewers, critics, and distributors of widely-popular and, in some cases, award-winning, films. There are countless movie reviews, critiques, and advertisements that present films as containing sexually-explicit depictions of underage characters. In some cases, these presentations describe the films as obscene. These reviews and advertisements are banned by the facial language of Section 2252A(a)(3)(B) because they knowingly present material in a manner that reflects the belief (as opposed to the reality) or causes the belief (not the reality) that the material contains actual and/or obscene child pornography.

The legislative findings supporting Section 2252A(a)(3)(B) do not narrow or otherwise limit its unconstitutional overbreadth. Congress has offered little to no connection

between the types of speech targeted by Section 2252A(a)(3)(B) and the likelihood that such prohibition will curtail the market for child pornography. In addition, the claim that prosecutors need Section 2252A(a)(3)(B) to fend off "virtual-child" defenses in child pornography cases is simply not supported by the record. Federal prosecutors have experienced extraordinary success in child pornography cases, even after the Court's decision in *Free Speech Coalition*, and do not need overly broad restrictions on speech and belief in order to be successful.

Finally, Section 2252A(a)(3)(B) is unconstitutionally vague because it fails to define the core phrases "reflects the belief" and "cause another to believe," thereby allowing law enforcement officers unfettered discretion in applying and enforcing the law.

ARGUMENT

1. SECTION 2252A(a)(3)(B) IS UNCONSTITUTIONALLY OVERBROAD.

Section 2252A(a)(3)(B)'s plain language, which bans the communication of beliefs about constitutionally-protected material is unconstitutionally overbroad because it impermissibly suppresses speech and beliefs that are protected by the First Amendment. Section 2252A(a)(3)(B) directly contravenes the fundamental principle that "[sexually-explicit] speech that is neither obscene nor the product of sexual abuse [of a real minor] retains protection of the First Amendment." *Ashcroft v. The Free Speech Coalition*, 535 U.S. 234, 251 (2002) (citing *New York v. Ferber*, 458 U.S. 747, 764-65 (1982)). It also undermines the firmly established principles that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech" and that "[p]rotected

speech does not become unprotected merely because it resembles the latter." *Id.* at 255. Moreover, Section 2252A(a)(3)(B) disregards this Court's admonition that "First Amendment freedoms are most in danger when the government seeks to control thought or justify its laws for that impermissible end. The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought." *Id.* at 253. In short, under the guise of protecting children, Congress has impermissibly cast its legislative net far beyond the permissible target of child pornography and into the waters of protected speech.

A. The Plain Language of Section 2252A(a)(3)(B) Captures Far More Speech Than Just "Pandering."

Petitioner characterizes Section 2252A(a)(3)(B) as being a "pandering statute." *See* Pet. Br. 16, 17, 31, 37; *United States v. Williams*, 444 F.3d 1286, 1289, n.2 (11th Cir. 2006). But the term "pander" is nowhere found in this provision. Instead, the statute contains the more generic and unqualified terms "advertises," "promotes," "presents," "distributes," and "solicits." The common definitions of these terms and the legal parameters of the statute do not require that these five forms of expression be erotic in nature or be made in relation to an attempted sale, purchase, or other transaction.

In addressing Section 2252A(a)(3)(B), the Eleventh Circuit defined pandering as "the catering to or exploitation of the weakness of others." *Williams*, 444 F.3d at 1289 (citing Merriam Webster Online Dictionary). But the plain language of Section 2252A(a)(3)(B) does not require the expressive acts of advertising, promoting, presenting,

distributing, or soliciting to be offered in a manner that caters to or exploits the weaknesses of others. These five forms of expression, whether they are used as a method to cater or as a means of description, whether made in an effort to exploit or an attempt to inform, or whether they are directed at the weak-minded or the astute, are all banned if they "reflect the belief" or "cause another to believe" that the discussed material is or contains real or obscene child pornography.

In short, Section 2252A(a)(3)(B) makes no effort to incorporate the term pandering into its legislative lexicon. Nor does this provision exempt or otherwise protect expression that is offered for literary, artistic, scientific, or other non-commercial purposes. As a result, Section 2252A(a)(3)(B) is far broader than a pandering statute.[2]

B. Section 2252A(a)(3)(B) Bans Much More Speech Than Just "Offers" and "Solicitations."

At times, Petitioner describes Section 2252A(a)(3)(B) as simply prohibiting offers or solicitations to buy or sell child pornography. *See* Pet. Br. 15, 17, 21, 24, 28. But the plain language of the statute applies to far more forms of expression

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[2] If Congress simply sought to ban pandering under Section 2252A(a)(3)(B), it could have followed the language of 39 U.S.C. § 3008(a) and specifically used the term. Section 3008(a) provides, "Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postal Service to refrain from further mailings of such materials to designated addresses thereof." But instead Congress chose to use wording that captures expression far broader than mere pandering.

than just offers and solicitations. The reality is that the terms "advertise," "promote," and "present" are not limited to acts of bartering or commodity exchanges, but include more general and public presentations and notifications about materials.

The term "advertise" is defined as "to make something known to: notify; to make publicly and generally known; to announce publicly especially by a printed notice or broadcast." *See* Merriam Webster Online Dictionary, http://www.m-w.com (last visited July 30, 2007).[3] The word "present" is defined as "(1): to bring or introduce into the presence of someone especially of superior rank or status (2) : to introduce socially b: to bring (as a play) before the public." *Id.* And the term "promote" is defined as "to advance in station, rank, or honor: raise." *Id.*

These contemporary definitions reflect that the common usage of the terms advertise, promote, and present is not limited to commercial, transactional, or bartering settings, but includes all forms of public pronouncements or introductions regarding particular materials. In other words, these definitions bolster the Eleventh Circuit's conclusion that Section 2252A(a)(3)(B) "is not limited to commercial

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[3] This is a more contemporary dictionary than the one offered in Petitioner's brief. Petitioner offers more transactional or bartering-dependent definitions for the terms in Section 2252A(a)(3)(B), using an older dictionary (*Webster's Third New International Dictionary*, (1961)) and some isolated definitions found therein. Pet. Br. 27. Although conceding that Section 2252A(a)(3)(B) applies to non-commercial forms of advertising, promotion, presentation, distribution, and solicitation, Pet. Br. 18-24, Petitioner nonetheless seeks to limit the scope and meaning of the terms "advertise," "promote," and "present."

exploitation and continues to sweep in non-commercial speech." *Williams*, 444 F.3d at 1298.

C. The Facial Language of Section 2252A(a)(3)(B) Captures Vast Amounts of Protected Speech.

Petitioner contends that "Section 2252A(a)(3)(B) could not ensnare promotions of Romeo and Juliet or mainstream movies such as *American Beauty* and *Traffic*." Pet. Br. 41. According to Petitioner, Congress observed that because "the producers of movies like *American Beauty* and *Traffic* do not intend for viewers to believe that real children are actually engaging in sexual activity . . . the movie producers [could not] satisfy the specific intent required by this provision." *Id.* (citing S. Rep. No. 2, 108th Cong., 1st Sess. 10, n.6 (2003)). There are two fundamental flaws with this position, each of which demonstrates the substantial overbreadth of Section 2252A(a)(3)(B).

1. Section 2252A(a)(3)(B) Applies to the Producers of Constitutionally-Protected Movies and Other Dramatic Works.

First, contrary to Petitioner's claims, many movie producers and other creators involved in the dramatic arts absolutely and intentionally seek to create the belief within their viewers that what is happening on the screen or stage is happening in reality. This is known as creating a "willing suspension of disbelief."[4] There is nothing surreptitious or

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[4] Samuel Taylor Coleridge is credited with originating this phrase *See* Samuel Taylor Coleridge, *Biographia Literaria* ch. xiv, (J. Shawcross ed., Clarendon Press 1907) (1817) (wherein Coleridge

devious about this method. Producers and other creators of dramatic productions are open about its use.[5] In fact, one local theater in Florida openly tells its audiences to bring a "*willing suspension of disbelief*" to the performances, informing them that "You and the actors have an agreement. They will create the imaginary world in which the drama takes place, and you agree to believe/accept the imaginary world that they create."[6]

For many, the willing suspension of disbelief is the central element of any successful dramatic production.[7] It is the essence of a good performance. It is the dynamic that causes movie viewers to cry when a cartoon deer is killed in *Bambi*, or to scream when a mechanical shark attacks an unsuspecting swimmer in *Jaws*, or to openly cheer when an oddly-shaped

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asks his readers to offer "that willing suspension of disbelief for the moment that constitutes poetic faith.").

[5] Andrew Tudor, *Monsters and Mad Scientists: A Cultural History of the Horror Movie* 121 (1989) (asserting that it is "commonplace to invoke 'willing suspension of disbelief' in discussing the nature of our involvement in fictional worlds . . . [w]e approach fictions already motivated to believe, prepared to be drawn into their worlds, wanting to be excited, moved, absorbed and captivated . . . .").

[6] Asolo Repertory Theatre, Sarasota, Florida. http://www.asolo.org /education/coming_to_theatre.asp, (last viewed August 2, 2007).

[7] *See* Charlotte Chandler, *It's Only a Movie: Alfred Hitchcock: A Personal Biography* 298 (2005) (identifying Hitchcock's credo in producing movies as "the willing suspension of disbelief" and discussing Hitchcock's claim that "although his pictures are very often high melodrama and border on the improbable, there was absolutely nothing in them that was illogical or dependent on pure chance.").

alien escapes to freedom in *E.T.* These audience reactions are effectuated through techniques that intentionally encourage viewers to adopt a temporary belief that what is portrayed on the screen or stage is happening in real life.[8] *See Williams*, 444 F.3d at 1302, n.80 (noting that "the whole aim of dramatic presentation is to make fictional happenings 'appear' to be real.").

For better or worse, the same dynamic of drama occurs within well-produced and constitutionally-protected depictions of youthful sexuality. In a multitude of movies, audience members are encouraged to suspend their common understanding that the depicted performers are just actors (regularly, adult performers), who are not really participating in sexual conduct, and asked to believe that these youthful characters actually *are* engaged in sexual activity. Whether in *American Beauty*, where a middle-age man is depicted as participating in sexual foreplay with a teenager, or in *Titanic*, where two underage lovers are viewed as consummating their relationship in a car, or in *Traffic*, where a teenager is shown prostituting herself for drugs, viewers are made to believe, if only for a moment, that the depicted underage characters are participating in sexual conduct.

And so, contrary to Petitioner's claims, it is likely that many producers and creators of mainstream movies *are* captured by the facial language and criminal confines of Section 2252(a)(3)(B) because, ostensibly, these producers,

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[8] Jeremy Lopez, *Theatrical Convention and Audience Response in Early Modern Drama* 95 (2003) (asserting that the "willing suspension of disbelief" can more accurately be called "a willingness to think of the play as though it were not a representation, as though it, like 'real life,' did not have a carefully constructed beginning, middle, and end . . . .").

consistent with the core mission of any movie production, intend for their viewers to believe that what is happening on the screen, including depictions of underage sexuality, is happening in reality.

More important, the creation of belief in dramatic audiences – regardless of the genre – is precisely what the First Amendment protects. *See Ferber*, 458 U.S. at 763 (making it clear that, to the extent a sexual message is important for literary, scientific, educational or artistic purposes, it can be delivered by using young-looking adults or some other form of "simulation" in the visual depiction). Plainly, the core of expressive freedoms protected by First Amendment includes the freedom of art to imitate real life. Because Section 2252A(a)(3)(B) criminally sanctions and disrupts this artistic endeavor, it is substantially overbroad.

2. Section 2252A(a)(3)(B) Muzzles More Speakers Than Just Movie Producers.

The second problem with Petitioner's claim that Section 2252A(a)(3)(B) does not ensnare the producers of mainstream movies is that producers are not the only individuals who offer advertisements, promotions, and presentations of dramatic material. Countless film critics, movie reviewers, and other persons interested in commenting on or selling dramatic art regularly transmit advertising, promotions, and presentations – both positive and negative – of material that they themselves did not produce. In many of these critical, expressive, and fully-constitutional outlets, the speakers are knowingly expressing themselves in a manner that reflects the belief and/or that causes others to believe that the dramatic work being reviewed is or contains youths engaged in sexual activity.

These forms of expression by non-producers are far from "hypothetical," "unrealistic," or "imagined." Pet. Br. 40, 42. As evidenced by the following movies and their associated reviews and advertisements, there are large quantities of constitutionally-protected materials, offered via the Internet or otherwise disseminated through interstate commerce, that are captured directly by the facial language of Section 2252A(a)(3)(B).

American Beauty (1999). The *Chicago Reader* presented a review of this Academy Award winning film wherein the reviewer expressed the belief that the film was either "a brilliant satirical diagnosis of what's most screwed up about life in this country . . . [o]r . . . a hypocritical piece of kiddie porn, brilliantly exploiting an audience's sexual frustration and turning it into coin."[9] Another movie review, entitled "An American Obscenity: A Review of the Oscar-Winning *American Beauty*," stated that movie "is about a man in middle age crisis who become infatuated with a teenage girl."[10]

Y Tu Mama Tambien (2002). Amazon.com advertises this film, which received the Golden Globe and New York Film Critics Circle Awards for Best Foreign Language Film, as a "three-way odyssey of two 17-year-old Mexican boys . . . and a 28-year-old Spanish beauty" that has "enough male and

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[9] http://www.chicagoreader.com/movies/archives/1999/0999/09249.html (last visited August 8, 2007).

[10] http://www.libertarian.co.uk/lapubs/cultn/cultn046.pdf (last visited August 8, 2007).

female nudity to qualify as softcore porn."[11] Christian Spotlight on Entertainment presents the movie as "the story of the dissolution of a friendship between two seventeen year old boys. . . . There is graphic sex, abundant nudity, casual adultery, masturbation and homosexuality. . . [It] looks like a modern day Gomorrah . . . ."[12] And Victoria Alexander of FilmsinReview.com comments that the film "starts right off with sloppy, messy, non-structured sex scenes involving 17-year-old[s] [Tenoch and Julio]." The review states that "As 17 year-olds, their entire day consists of talking about sex and masturbating. Be prepared for lots of blunt talk, realistic sex scenes, and body fluids floating in country club pools. This is real people sex with bad lighting and no choreography."[13]

Lolita (1998). Christian Spotlight on Entertainment paints this movie as "sickening and disturbing," and asserts that "[t]he theme of the movie speaks for itself." The review goes on to say, "With all the discussion today about child pornography and pedophiles this movie is a perfect example of that."[14] The U.S. Conference of Catholic Bishops Office for Film and Broadcasting ("Conference of Catholic Bishops") states that the movie is a "[g]lossy but empty

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[11] http://www.amazon.com/Mama-Tambien-Ana-L%C3%B3pez-Mercado/dp/B00005JL57 (last visited August 8, 2007).

[12] http://www.christiananswers.net/spotlight/movies/2002/ytumamatambien.html (last visited August 8, 2007).

[13] http://www.rottentomatoes.com/click/movie-1110860/reviews.php?critic=columns&sortby=default&page=1&rid=301820 (last visited August 8, 2007).

[14] http://www.christiananswers.net/spotlight/movies/pre2000/rvu-lolita.html (last visited August 8, 2007).

version of Vladimir Nabokov's novel about a middle-aged man . . . whose sexual obsession with a 12-year-old girl . . . ends tragically. [The director's] titlillating treatment of the pair's cross-country sexual odyssey lacks any sense of a larger human context other than that of a troubled pedophile. Gory violence, frontal nudity, explicit sexual situations . . . ."[15]

Mysterious Skin (2005). The Conference of Catholic Bishops refers to this movie as "Powerful, at times graphic, story of how being sexually abused as youngsters altered the lives of two teenagers . . . the sexual content is so raw, that many will find the film repellant and difficult to sit through. Rough and crude language, rear nudity, sordid sexual situations including violent rape, prostitution and drug use."[16]

Thirteen (2003). The Conference of Catholic Bishops presents this film as an "[u]nflinching drama about a clean-scrubbed seventh-grader . . . who is led astray by her charismatic but out-of-control classmate . . . its raw unfiltered depictions of self-destructive behavior, including drugs and casual sex, are at times difficult to watch . . . Several sexual encounters . . . ."[17] Amazon.com includes a product description stating, "'Brace yourself' (Rolling Stone) for a raw, revealing insight into urban adolescence that's so intense and realistic . . . thirteen-year-old Tracy . . . goes to shocking

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[15] http://www.usccb.org/movies/l/lolita1998.shtml (last visited August 8, 2007).

[16] http://www.usccb.org/movies/m/mysteriousskin.shtml. (last visited August 8, 2007).

[17] http://www.usccb.org/movies/t/thirteen2003.shtml (last visited August 8, 2007).

lengths in order to befriend . . . the most popular girl in school . . . leaving Tracy's desperate mom . . . powerless to rescue her from a whirlwind of drugs, sex and crime."[18]

American Pie (1999). Amazon.com advertises this movie with an editorial review stating that this film about teenagers "highlights intercourse with fruit pies, premature ejaculation broadcasted across the Internet, and the gratuitous 'gross-out' shots . . ."[19]

Kids (1995). The Conference of Catholic Bishops presents this film as "A day in the so-called life of a group of feral inner-city youths shows them to be aimless dropouts from home, school and the human race as they pass the time in pursuit of sex . . . [the Director] uses a lot of hand-held camera shots in filming a cast of adolescent non-actors in New York locations . . . Exploitative treatment of sex, violence, substance abuse and rough language."[20] And barnesandnoble.com offers this synopsis: "*Kids* offers a bleak, unblinking view of a group of vacuous, thoughtless New York City teens in their ceaseless quest for sex, drugs, and trouble . . . [T] he scene is set for disaster as the group

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[18] http://www.amazon.com/Thirteen-Holly-Hunter/dp/B00013RC2K (last visited August 8, 2007).

[19] http://www.amazon.com/American-Pie-Unrated-Widescreen-Collectors/dp/B000031WD9 (last visited August 8, 2007).

[20] http://www.usccb.org/movies/k/kids1995.shtml (last visited August 8, 2007).

heads back to a vacant apartment for an evening of sex, booze, drugs, and debauchery."[21]

Fast Times at Ridgemont High (1982). The Conference of Catholic Bishops presents this movie as an "examination of teen mores in the suburban jungle of shopping malls, discos and the playing fields of Southern California . . . Some extremely graphic nudity and a scene of adolescents discussing oral sex."[22]

Porky's (1982). The Conference of Catholic Bishops presents this movie as "Sex-obsessed adolescents cavort at a Florida high school . . . Witlessly vulgar movie with much nudity, graphic sexuality and an almost non-stop flow of verbal obscenities."[23]

The Tin Drum (1979). The Conference of Catholic Bishops describes this Academy Award-winning movie as a "German adaptation of Gunter Grass' satiric novel about a boy (David Bennent) who, in protest against the absurd world of adults, decides to stop growing on his third birthday . . . Crudely graphic treatment of sex, especially in scenes with the 13-year-old Bennent.[24] In other presentations, individuals

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[21] http://video.barnesandnoble.com/search/product.asp?z=y&EAAN=031398751823&itm=1 (last visited August 8, 2007).

[22] http://www.usccb.org/movies/f/fasttimesatridgemounthigh1982.shtml (last visited August 8, 2007).

[23] http://www.usccb.org/movies/p/porkys1982.shtml (last visited August 8, 2007).

[24] http://www.usccb.org/movies/t/tindrumthe1980.shtml (last visited August 8, 2007).

and public officials also expressed their belief that this movie was obscene, child pornography, or both.[25]

Pretty Baby (1978). The Conference of Catholic Bishops describes this movie as "The story of a 12-year-old girl (Brooke Shields), born and raised in a house of prostitution . . . [The director's] listless, dubiously nostalgic tour of a bordello relies on extravagant nudity and the flagrant exploitation of a 12-year-old girl."[26]

Reading each of these reviews, a reasonable person could conclude that mainstream, constitutionally-protected, and in some cases, award-winning, movies are knowingly being advertised, promoted, presented, and/or distributed, via interstate commerce, in a manner that reflects the belief or that causes another to believe that the material contains actual child pornography or, in some cases, obscene child pornography. In short, the facial language of Section 2252A(a)(3)(B) captures the content of each of these reviews, and in so doing, silences even the most literary, artistic, religious-based, or critical advertisements, promotions, or presentations of material discussing children and sexuality. Such extraordinary censorship is patently unconstitutional.

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[25] *See* Charles Oliver, "The Tin Drum Meets the Tin Badge: How a classic 1979 film suddenly turned into child porn," *Reason Magazine*, October 1997 at 50-51.

[26] http://www.usccb.org/movies/p/prettybaby1978.shtml (last visited August 8, 2007).

D. Section 2252A(a)(3)(B)'s Broad Sweep of Constitutionally-Protected Expression Is Not Justified By The Legislative Findings.

Petitioner attempts to justify the enormous scope of Section 2252A(a)(3)(B) by pointing to the legislative findings underlying the law, which suggest that the provision is needed to "dry up the market" for real child pornography and to assist prosecutors in securing convictions in child pornography cases. Pet. Br. 6, 31. These claims are far from compelling.

1. There Is No Causal Link Between Section 2252A(a)(B)(3)'s Ban on Protected Speech and Drying Up the Market for Child Pornography.

Petitioner claims that Section 2252A(a)(3)(B) is necessary because "even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material." Pet. Br. 31 (quoting H.R. Conf. Rep. No. 108-66, at 62 (2003)). There are several deficiencies with this attempted justification.

First, the legislative findings contradict the clear and repeated mandate of this Court that "Government may not suppress lawful speech as the means to suppress unlawful speech." *Free Speech Coalition*, 535 U.S. at 255. Second, the congressional findings fail to establish how certain presentations of material, which may not actually be child pornography or may not even be actual material ("purported material") will dry up the market for real child pornography. There is simply a lack of evidence and logical nexus to explain how barring protected speech will lead to a "drying of the market" for real child pornography. *See Williams*, 444 F.3d. at 1303 (concluding that "Congress has not adequately

explained why the mere [advertising, presentation, or promotion] of otherwise legal material should be prohibited in the pursuit of this interest."). And third, even if Congress had evidence to support its market theory of stopping "fraudulent offers to buy or sell unprotected child pornography," Section 2252A(a)(3)(B) goes well beyond facilitating this intended interest. The facial terms of the law are not limited to actual child pornography but are extended to other materials or even non-materials (purported items) that are not, in fact, real child pornography. Moreover, Section 2252A(a)(3)(B) is not limited to fraudulent sales or purchases. Persons with no intent of duping others into buying or selling real child pornography can nonetheless be prosecuted if they knowingly present material in a manner that reflects their belief about the content of the material.

As a result, in addition to being unsubstantiated by factual evidence, Petitioner's claimed "market theory" does not match up with the facial language of the statute.

2. Federal Authorities Have Had Little Trouble Securing Child Pornography Convictions.

As it did in *Free Speech Coalition*, Petitioner again claims that federal prosecutors have struggled to secure convictions in child pornography cases because it is difficult for them to meet their evidentiary burden of showing that the person depicted in sexually-explicit materials is an actual child. Pet. Br. 6. With all due respect, this claim is grossly exaggerated.

First, it should be noted that, even before Section 2252A(a)(3)(B)'s enactment, there were only a few defendants acquitted in child pornography cases. Of the 2091 child pornography cases initiated by the government between 1992 and 2000, only 10 defendants, regardless of what defense

strategy they employed, were acquitted. *See* Dept. of Justice, Executive Office for United States Attorneys, *Review of Child Pornography and Obscenity Crimes*, Report No. I-2001-07, Table 3, "Child Pornography Conviction Statistics." This amounts to a remarkably-low acquittal rate of only 0.4%. Even more telling is that none of these acquittals are reported as being based on the so-called "virtual child" defense. *Id.* In addition, both prior to and after the PROTECT Act's passage, federal prosecutions of child pornography have increased substantially. As the Eleventh Circuit recognized, "[t]otal federal prosecutions of child pornography cases increased more than 452% from 1997 to 2004." *Williams*, 444 F.3d at 1290 n.3 (citing Statement of Laura H. Parsky, Deputy Asst. Attorney General before Senate Comm. on Commerce, Science, and Transportation, January 19, 2006).

The legislative findings supporting Section 2252A(a)(3)(B) include the claim that criminal defendants in child pornography cases have raised the "virtual child" defense in nearly every case following the Supreme Court's decision in *Free Speech Coalition*. *See* PROTECT Act, Pub. L. No. 108-21, § 103, 117 Stat. at 677-78, Finding 10 (2003). The findings further claim that "[s]ome of these defense efforts have already been successful." *Id.* But Congress cites no specific cases in support of this conclusion. *Id.* In fact, the legislative findings supporting Section 2252A(a)(3)(B) do not offer a single child pornography case where a jury accepted a defendant's virtual-child defense.

During hearings held on what ultimately became the PROTECT Act, Congress was supplied with three post-*Free Speech Coalition* cases, with the claim that the virtual-child defense asserted in these cases resulted in "several adverse judgments" for the government. *See Child Abduction Prevention Act and the Child Obscenity and Pornography*

Prevention Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before House Subcomm. on Crime, Terrorism, and Homeland Security, 108th Cong. 22-24 (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General) ("Collins statement"). But a closer examination of these cases, as they were presented to Congress, reveals that the virtual-child defense was not as successful for the defendants as the government claims.

In the first case, *United States v. Sims*, 220 F.Supp.2d 1222 (D.N.M. 2002), the defendant was originally convicted by a jury of four counts of offenses relating to the sexual exploitation of minors. During trial, the government argued that it was not required to prove that the visual depiction at issue in the fourth count of the indictment was that of a real minor, and the trial court agreed. *Id.* at 1224. As a result, the government did not present *any* evidence at trial that any of the charged images involved the use of actual children engaged in sexually-explicit conduct. *Id.* at 1227. Later, after the decision in *Free Speech Coalition* was announced, the trial court granted the defendant's motion for judgment of acquittal as to the fourth count, ruling that the government had the burden of proving that an actual child was depicted. *Id.* at 1228-29. The trial court, however, noted that "the government could have taken a more cautionary approach and presented evidence to prove the use of actual children, but it made the strategic decision not to do so." *Id.* at 1227. Thus, *Sims* does not support the legislative finding that the virtual-child defense has been "successful." The jury in *Sims* did not buy the defendant's arguments, even in the absence of governmental proof to the contrary.

Congress was also presented with *United States v. Bunnell*, 2002 WL 927765 (D.Me. May 1, 2002), with the claim that the district court in that case granted the

defendant's motion to withdraw his guilty plea to child pornography charges after *Free Speech Coalition* was decided. *See* Collins statement, *supra*, p. 22. This case, however, does not illustrate the success of the virtual-child defense. First, the defendant in *Bunnell* never went to trial, and thus, the virtual-child defense was never presented, successfully or otherwise, to a jury. *See* Criminal Docket for United States District Court, District of Maine, Case No. 1:02-CR-13-GZA-ALL. In addition, although the defendant filed a pretrial motion to dismiss the indictment based, in part, on constitutional arguments raised in *Free Speech Coalition*, this motion was denied by the district court. *See Bunnell*, 2002 WL 927765 at *5. Thus, in the end, the virtual-child defense did not result in an adverse judgment against the government.

Finally, Congress was given *United States v. Reilly*, 2002 WL 31307170 (S.D.N.Y. Oct. 15, 2002), as evidence that a defendant was permitted to withdraw his guilty plea after the *Free Speech Coalition* decision. *See* Collins statement, *supra*, p. 22. While the district court in that case did permit Reilly to withdraw his guilty plea following *Free Speech Coalition*, the court's ruling did not rely on any asserted virtual-child defense. *See Reilly*, 2002 WL 31307170 (S.D.N.Y). Rather, the court found that Reilly's plea allocution was deficient because it was based on the defendant's "mistaken premise" that the government could prove its case without proving that Reilly had knowledge that the charged material depicted actual children. *Id.* at *2. At the time Congress passed the PROTECT Act, Reilly had not been acquitted and the virtual-child defense had not been successfully presented to a jury. *See* Criminal Docket for United States District Court, Southern District of New York, Case No. 01CR-1114-RPP.

In the end, the legislative findings behind Section 2252A(a)(3)(B) suffer from the same infirmities as those constructed in the failed effort to justify the "conveys the impression" provision stricken in *Free Speech Coalition*. The reality is that, in terms of the substance of the legislative findings, nothing much has changed since the Court's decision in *Free Speech Coalition*. The fact of the matter is that federal authorities have had remarkable success in prosecuting child pornography cases before, during, and after *Free Speech Coalition*. Consequently, any legislative claims of difficulty in securing convictions in child pornography cases due to the availability of the "virtual child" defense are not only far from compelling, they are also a good distance from reality.

II. SECTION 2252A(a)(3)(B) IS UNCONSTITUTIONALLY VAGUE.

Under the void-for-vagueness doctrine, laws can violate the Due Process Clause of the Fifth Amendment in two ways: (1) when they do not give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, thereby failing to provide fair warning to those who wish to act lawfully, and (2) when they impermissibly delegate fundamental questions of policy to police officers, judges, and juries, thereby allowing for resolution of those questions on "an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Section 2252A(a)(3)(B) violates the Due Process Clause in each of these ways.

First, Section 2252A(a)(3)(B) fails to define basic terms and phrases necessary to give persons of ordinary intelligence a basic understanding of what is prohibited. The statute fails to define its highly subjective, yet key, phrases "reflects the

belief" and "causes another to believe." Consequently, persons are left wondering: "What is a belief?" "Must a belief be genuine?" "What words or ideas reflect a belief?" "If the words 'teen,' 'high school,' or 'young' are used to describe images, does that automatically reflect the belief that a minor is depicted, as opposed to an eighteen or nineteen-year-old?" "What if the speaker is conveying a third party's belief about material?" "What's the difference between a belief and an opinion?" and "What if the belief caused in another person is an unreasonable one?" Without any clear answers to these questions, law-abiding citizens attempting to conform their conduct to the law cannot know for certain what these phrases actually mean. This is particularly problematic given that beliefs are regarded by some as being products of the imagination. *See* Gloria Gannaway, *Transforming Mind: A Critical Cognitive Activity* 99 (1994) (discussing the psychological theory that beliefs are "more like fantasies, products of the imagination, than like correlaries of experience.").

Second, Section 2252A(a)(3)(B)'s failure to provide definitions to these two key phrases gives law enforcement officials unbridled discretion in enforcing Section 2252A(a)(3)(B). The undefined phrases of this provision permit law enforcement officials to make completely subjective judgments about whether speech conveys the belief or causes a particular belief regarding the substance of a work or purported work. Given that a United States Senator has defined "safe-sex" educational materials as obscene,[27] a federal court has classified some visual depictions of fully

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[27] Former Senator Jesse Helms (R-NC) asserted that written educational materials promoting "safe sex" were "obscene." 133 Cong. Rec. S14203 (daily ed. Oct. 14, 1987).

clothed persons as "sexually explicit,"[28] and numerous movie reviewers have described award-winning and mainstream movies as child pornographic and/or obscene, *see supra* section I.C.2, one can only imagine the types of material that law enforcement officials will find criminal under the amorphous phrases "reflects the belief" and "causes another to believe."

Indeed, the entire prospect of allowing law enforcement officials to punish people based on their beliefs is a highly dubious enterprise, more reflective of an effort to gain totalitarian control over individuals than to maintain an open and free society. *See United States v. Ballard*, 322 U.S. 78, 86 (1944) (the freedom of belief, like the freedom of thought, "is basic in a society of free [people] . . . [Individuals] may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs."); *Free Speech Coalition*, 535 U.S. at 253 ("the right to think is the beginning of freedom"); *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940) ("the freedom to believe . . . is absolute."); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control [people's] minds.").

Plainly stated, Section 2252A(a)(3)(B)'s ill-defined attack on beliefs and expression creates a "risk of discriminatory enforcement," which, when coupled with the severity of the criminal sanctions threatened by the Act, "raises special First

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[28] *See United States v. Knox*, 32 F.3d 733, 749 (3d Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), where the court opined that the phrase "lascivious exhibition of the genitals or pubic area" does not require full or partial nudity, but can also apply to clothed persons as well.

Amendment concerns." *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (finding that regulations of speech that threaten criminal sanctions, "when coupled with the 'risk of discriminatory enforcement' of vague regulations, poses greater First Amendment concerns than those implicated by . . . civil regulation[s]").

CONCLUSION

In attempting to address the true evils of child pornography, Congress must remain committed to the fundamental rights of all individuals under the First Amendment and resist attacking protected forms of *expression* in order to punish illegal forms of *conduct*. In short, Congress must not "burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Section 2252A(a)(3)(B) fails to comply with this basic First Amendment requirement, and thus, is unconstitutional. Accordingly, the Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL WILLIAMS, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE LIGHTED CANDLE SOCIETY AND FAMILY LEADER FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether 18 U.S.C. § 2252A(a)(3)(B), which prohibits "knowingly * * * advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing] * * * any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material" is illegal child pornography, is overbroad and therefore facially unconstitutional.

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

In passing the PROTECT Act, Congress correctly recognized that child pornography is an enormous social problem that not only imposes serious injury on the children involved, but also injures those who may become addicted to viewing the resulting images, and their families. Unfortunately, the Eleventh Circuit struck down the Act's pandering provision based on a fundamental misunderstanding of both the market for child pornography and the applicable First Amendment principles.

The market for child pornography is grounded largely on a system of barter, in which child pornography is not only the desired commodity, but also the currency of the realm. Before the PROTECT Act, entrants into this market could use false or exaggerated claims about their non-pornographic (or even nonexistent) materials as a costless and low-risk means of acquiring child pornography. The PROTECT Act's prohibition on this "false pandering" imposes a significant cost on this form of "counterfeit" currency, thus serving as an important (if difficult to measure) component of the effort to dry up the market for child pornography. Because the Eleventh Circuit missed this aspect of the market for child pornography, it erroneously concluded that the prohibition on false pandering contributes nothing to Congress's compelling interest in protecting children from the harms associated with child pornography.

In the same way, the Eleventh Circuit wrongly concluded—without analysis—that most pandering is a form of non-commercial speech and thus entitled to full First

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, the *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Amendment protection. But given its commonplace use as a negotiating tool in the child pornography marketplace, pandering is largely, if not exclusively, a form of commercial speech. The pandering provision therefore does not reach a substantial amount of protected, non-commercial speech, and invocation of the overbreadth doctrine was thus inappropriate.

Finally, operating on an outdated understanding of child pornography as a form of speech, the Eleventh Circuit accorded full First Amendment protection to the promotion of that "speech," in spite of substantial scientific evidence that child pornography is not received by its viewers as speech at all. Properly understood, child pornography is not a form of speech any more than the consumption of addictive drugs or the use of a prostitute's services. And because the possession of child pornography (like the consumption of illicit drugs or use of a prostitute's services) is itself a crime, the pandering of child pornography is a form of immediate incitement to unlawful activity. As such, pandering is entitled to little, if any, First Amendment protection, and for that reason as well the Act does not restrict a substantial amount of protected speech.

Amici curiae Lighted Candle Society (LCS) and Family Leader Foundation have a strong interest in the proper resolution of these issues. LCS is a nonprofit organization dedicated to educating society about the dangers of pornography. To that end, the LCS conducts scientific research into the harms and addictive nature of pornography, and publishes information revealing the sources and effects of pornography. LCS is interested in this case because of its importance both in setting the limits of how government can combat child pornography, and in shaping society's attitudes toward such pornography.

The Family Leader Foundation (FLF) is a non-profit organization, with members nationwide, devoted to promoting principles and policies that strengthen traditional

families. FLF is interested in this case because of the serious adverse consequences of pornography, and particularly child pornography, on the families of both the children involved and older individuals who may view and perhaps become addicted to it.

STATEMENT

Since *New York* v. *Ferber*, 458 U.S. 747 (1982), this Court has recognized the harm inherent in the production and dissemination of child pornography, as well as the government's concomitant interest in prohibiting it. Although the Court's decision in *Ferber* (along with subsequent state and federal legislation) went a long way toward driving child pornography underground, the rise of the Internet has ignited an explosion of child pornography. By one estimate, over one million pornographic images of children are available on the Internet at any time, and over 200 new images are added each day.[2]

To combat the Internet-driven explosion in child pornography, Congress passed the Child Pornography Prevention Act of 1996 (CPPA), Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended at 18 U.S.C. §§ 2251 et seq.). The CPPA defined child pornography to include, among other things, any depiction of sexually explicit conduct that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(D) (1996) (invalidated 2002, amended 2003). This definition was known as the CPPA's "pandering" provision.

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[2] Wortley, Richard and Smallbone, Steven, *Child Pornography on the Internet, Problem-Oriented Guides for Police Problem-Specific Guides Series*, No. 41 at 12 (pub. avail. May 2006), (avail. at http://www.cops.usdoj.gov/mime/open.pdf?Item=1729) (citing Wellard, S.S., "Cause and Effect." *Community Care*, at 26–27, Mar. 15–21 (2001)).

In *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002), the Court struck down the pandering provision as unconstitutionally overbroad, reasoning that it "punishe[d] even those possessors who took no part in pandering." *Id.* at 242-43. That is, even if an image was not child pornography, once it had been pandered as child pornography, it became "tainted and unlawful in the hands of all who receive[d] it," even if those who received it had nothing to do with the original pandering. *Id.* at 258.

In response to *Free Speech Coalition*, Congress passed a new pandering provision in the PROTECT Act. Instead of *defining* child pornography to include any image that had been pandered as child pornography at any time, the PROTECT Act created a separate offense of pandering. Thus, instead of punishing the downstream possession of materials that had, at some point, been pandered, the Act targets the act of pandering itself.[3]

The instant challenge to the new pandering provision arose when defendant Michael Williams encountered an undercover federal agent in an Internet chat room. Williams had posted a public message in the chat room, stating, "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." 444 F.3d at 1288. Recognizing the chat room as one devoted to child pornog-

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[3] The new pandering provision subjects to criminal punishment any person who "advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains—

(i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or

(ii) a visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. § 2252A(a)(3)(B).

raphy, the agent engaged Williams in a private Internet chat, during which they traded non-pornographic images. Williams sent a photograph of a two- to three-year-old female lying on a couch in a bathing suit, along with several images of a one- to two-year-old female in various poses, "one of which depicted the child with her breast exposed and her pants down just below her waistline." *Ibid.* The agent sent Williams a photo of a college-aged female digitally regressed to look like a ten- to twelve-year-old, whom the agent claimed was her daughter.

After this exchange of photographs, Williams claimed to have nude photographs of his four-year-old daughter, stating, "I've got hc [hard core] pictures of me and dau, and other guys eating her out—do you??" *Ibid.* When the agent did not respond to Williams's request for more photographs, Williams accused the agent of being a cop. The agent responded by accusing Williams of being a cop. After repeating these accusations in the public part of the chat room, Williams posted a message stating, "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL—SHE CANT." *Id.* at 1289. Along with the message, Williams posted a computer hyperlink, which the agent accessed, and which contained seven images of actual minors, ages five to fifteen, engaging in sexual activity, displaying their genitals, or both.

Williams pled guilty to violating the PROTECT Act's pandering provision, but reserved the right to challenge its constitutionality. Although the district court rejected his constitutional challenge, the Eleventh Circuit reversed, striking down the pandering provision as both vague and unconstitutionally overbroad.

The court first acknowledged that the prohibition on pandering *actual* child pornography raised no constitutional difficulties. The problem, according to the court, was with the prohibition on "false pandering"—that is, pandering material that is *not* child pornography "in a manner that reflects the belief, or that is intended to cause

another to believe" that the material *is* child pornography. *Ibid.* And even then, the prohibition on false pandering was problematic only insofar as it applied to non-commercial speech, for, as the court acknowledged, "the First Amendment allows the absolute prohibition of . . . false advertising of any product . . . in the commercial context." *Id.* at 1298. Thus, the court focused its analysis on false pandering in the non-commercial context—such as "a non-commercial . . . braggart, exaggerator, or outright liar[,] who claims to have illegal child pornography . . . [but] actually has [only] a video of 'Our Gang,' a dirty handkerchief, or an empty pocket"—i.e., no child pornography at all—and concluded that the pandering provision was constitutionally overbroad because it "prohibits a substantial amount of constitutionally protected speech." *Id.* at 1296, 1298.

SUMMARY OF ARGUMENT

In striking down the PROTECT Act's pandering provision, the Eleventh Circuit committed three errors that infected its analysis and require reversal.

First, the court below fundamentally misunderstood the market for child pornography. "False pandering"—i.e., pandering material that is *not* child pornography as if it *is*—is a key form of currency in the barter-based child pornography marketplace. Prohibiting false pandering thus serves as an important (if difficult to quantify) component of the effort to dry up the market for child pornography.

Second, the Eleventh Circuit erred in concluding that pandering is primarily a form of non-commercial speech entitled to full First Amendment protection. To the contrary, pandering is largely, if not exclusively, a form of commercial speech, and the pandering provision therefore does not reach a substantial amount of protected, non-commercial speech. Accordingly, that provision also falls outside the overbreadth doctrine.

Third, the Eleventh Circuit erroneously assumed that the receipt of pornographic images is an act of expression subject to the usual panoply of First Amendment protections. In fact, however, substantial scientific evidence indicates that child pornography is not received by its viewers as speech at all. Properly understood, the viewing of child pornography is not a form of speech any more than is the use of drugs or the services of a prostitute. And because the possession of child pornography (like the use of illicit drugs or a prostitute's services) is itself a crime, the pandering of child pornography is a form of immediate incitement to unlawful activity. Pandering, therefore, is entitled to little, if any, First Amendment protection. And for this reason too, the Act's pandering provision does not reach a substantial amount of protected speech.

ARGUMENT

I. Punishing False Pandering Is An Important Means Of Restricting Participation In The Market For Child Pornography.

The Eleventh Circuit struck down the PROTECT Act's pandering provision because it prohibits pandering not only of child pornography, but also of material that is not child pornography—so long as the material is pandered "in a manner that reflects the belief, or that is intended to cause another to believe," that the material is child pornography. 18 U.S.C. § 2252A(a)(3)(B). According to the Eleventh Circuit, Congress "failed to articulate specifically how the pandering and solicitation of *legal* images, even if they are promoted or believed to be otherwise, fuels the market for illegal images of real children engaging in sexually explicit conduct." *Williams*, 444 F.3d at 1303 (emphasis added). Because the Eleventh Circuit failed to see a connection between the prohibition of false pandering and the government's compelling interest in protecting children from sexual abuse in the production of pornography, the court refused to sustain the statute under the market deterrence rationale articulated in *Ferber* and *Os-*

borne. See *Ferber*, 458 U.S. at 760 ("The most expeditious if not the only practical method of law enforcement [against child pornography] may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product.").

This conclusion is wrong not only because it disregards specific congressional findings about the market for child pornography, but also because it fundamentally misunderstands the characteristics of that market. As the PROTECT Act's Conference Report explains: "*even fraudulent offers* to buy or sell unprotected child pornography help to sustain the illegal market for this material." H.R. Rep. No. 108-66, Title V, at 62 (2003) (emphasis added).

Although credit cards and other forms of electronic payment fuel the online child pornography industry to the tune of billions of dollars each year, a large swath of the child pornography marketplace is fueled not by cash purchases but by barter—where child pornography is both the product and the currency. See Creighton, Susan J., *Child Pornography: Images of the Abuse of Children*, NSPCC Research Briefing (Nov. 2003) (available at http://www.nspcc.org.uk/Inform/Research/Briefings/ImagesOfChildAbuse_ifega45952.html) ("The use of child pornography for barter . . . has increased with the advent of the Internet[,] . . . [and] the desire for new pictures can lead some consumers to abuse their own, or neighbouring children, in order to supply fresh images for barter . . . ."). A wide variety of fora, such as peer-to-peer networks, email, or chat rooms, allow users to exchange images freely and anonymously over the Internet. *Regarding Peer-to-Peer Networks and Child Pornography*, 109th Cong. (Sept. 9, 2003) (statement of John Malcolm, Deputy Assistant Att'y Gen., Criminal Division, U.S. Dep't of Justice). In short, the medium of exchange is often not money, but more child pornography. *Ibid.*

Before completing an exchange, child pornographers often engage in lengthy and elaborate negotiations. Some users "set up 'rules' for access to [their] file collection. Thus, for example, a user will allow another user to download five images only if that person first uploads three images." *Ibid.* Other negotiations can be quite complex and take place over weeks or months. As in this case, child pornographers are wary of law enforcement agents posing as fellow pornographers. Accusations of being an undercover officer are common, and traders often begin by exchanging non-pornographic images, and working their way up to actual child pornography.

This bartering process is almost invariably accompanied by inflated claims of value—both of the volume and type of child pornography a pornographer has. And, as in other markets, many transactions do not take place because the parties are unable to agree upon satisfactory terms, or because the claims of one or both parties prove false or inflated.

Nevertheless, this sort of pandering—this "puffing" or "hawking" of one's wares, including both false and inflated claims as well as truthful ones—is an essential part of the child pornography marketplace. False and inflated claims actually serve as a form of currency (albeit counterfeit), allowing seekers of child pornography to "trade up" for more and "better" images even if they lack a broad collection of hard core images of their own. They are, in effect, an important expression of the "demand" for child pornography, thus driving the supply of actual child victims. See H.R. Rep. No. 108-66, Title V, at 62 (2003).

The punishment of pandering, therefore—even when the pandered material is not actually child pornography or does not exist at all—imposes a significant cost on the child pornography market. When false pandering goes unpunished, child pornographers have an essentially risk-free form of currency. They can enter chat rooms, negotiate with false promises of providing "hard core" images,

and obtain images from other pornographers, all without actually possessing illicit images. Punishing false pandering therefore serves an important purpose: it increases the risk (and cost) to those who would otherwise "trade up" (or enter the market for the first time) based on false promises to provide illicit images.

While the impact on the market of this increased cost is difficult to quantify, that difficulty should not categorically preclude Congress from choosing to target an important expression of the demand for child pornography. To the contrary, the documented and important role of false pandering in accessing and expanding the market for illicit images provides a powerful justification for Congress' action, and rebuts the Eleventh Circuit's suggestion that no such connection exists. As Congress found: "dry[ing] up the market" for child pornography by "imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product" is an important tool in combating child pornography, and the government's compelling interest in preventing child sexual abuse "extends to stamping out the vice of child pornography at all levels in the distribution chain." Pub. L. 108-21 § 501(2)-(3). These findings are entitled to substantial deference. *Turner Broadcasting System, Inc.* v. *FCC*, 520 U.S. 180, 196 (1997).

II. Because False Pandering Is Largely, If Not Exclusively, A Form Of Commercial Speech, The Pandering Provision Does Not Reach A Substantial Amount Of Protected, Non-Commercial Speech.

An equally significant problem with the Eleventh Circuit's decision is its assumption, without analysis, that "most child pornography is discussed and exchanged" (and thus pandered) "[i]n a non-commercial setting," and there-

fore most pandering constitutes non-commercial speech.[4] 444 F.3d at 1304. The court acknowledged that "the pandering provision would likely pass our muster as a prohibition of unprotected forms of commercial speech" if commercial speech were all it covered. 444 F.3d at 1298. In that case, the court explained, the pandering provision would simply be a prohibition on truthful advertising of illegal products and false advertising of legal (or nonexistent) products—both of which are unprotected speech. See *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976). But because the court believed that the pandering provision prohibited a substantial amount of protected, *non-commercial* speech, it struck down the provision as overbroad. 444 F.3d at 1298.[5]

The assumption that most pandering (and, specifically, false pandering) of child pornography is non-commercial speech is baffling. Child pornography, like other contraband such as illicit drugs, firearms, or the services of a prostitute, is a highly valuable commodity. It drives billions of dollars in sales each year (not to mention related advertising), and it is traded on what may be an even

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[4] Commercial speech is typically defined as "speech proposing a commercial transaction," or "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 561-62 (1980).

[5] Even if pandering is non-commercial speech (which it is not), the Eleventh Circuit did not explain why *false* pandering, which necessarily consists of false statements of fact, is entitled to First Amendment protection in light of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). There, the Court emphasized that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." *Ibid.* False pandering is precisely such valueless speech.

greater scale. "Advertis[ing], promot[ing], [and] solicit[ing]" that valuable commodity is quintessentially a form of commercial speech. Just because the commodity is illegal does not mean that it is non-commercial.

Moreover, as noted above, false pandering in particular is an integral part of the negotiations in child pornography transactions, and can even serve as a form of currency. The "advertising, promoting, presenting, or distributing" of non-pornographic material in a manner that causes another to believe that the material is child pornography is, essentially, a form of bait and switch (or counterfeit) purchasing. It allows for low-cost (or no-cost) participation in the market for child pornography and gives pornographers with sparse collections an opportunity to amass more and harder-core images.

Similarly, another important type of false pandering is the "soliciting" of material in a manner that reflects the belief that the material is child pornography even when it is not—in other words, attempting to obtain illegal child pornography unsuccessfully, either because the material is not illegal or does not exist. False solicitation is often the flipside of false pandering. One party falsely panders material as if it is child pornography, while the other solicits what he believes to be child pornography. Both practices are an extremely common form of participation in the market for child pornography, and both are critical components of longer-term schemes to facilitate transfers of actual child pornography.

It is precisely this type of commercial conduct that Congress targeted in the false pandering provision of the PROTECT Act. As the House Conference Report explains:

> [The pandering] provision prohibits an individual from offering to distribute anything that he specifically intends to cause a recipient to believe would be actual or obscene child pornography. It likewise prohibits an individual from soliciting what he believes to be actual or obscene child pornography.

> The provision makes clear that no actual materials need exist; the government establishes a violation with proof of the communication and requisite specific intent. Indeed, even fraudulent offers to buy or sell unprotected child pornography help to sustain the illegal market for this material.

H.R. Conf. Rep. 108-66 at 61-62 (2003). The vast majority of what is technically pandering will fall into one of these two categories of commercial speech.

In short, notwithstanding the Eleventh Circuit's far-fetched hypotheticals, the "plainly legitimate applications" of the pandering provision far outstrip its "application to protected speech," and the "expansive remedy" of overbreadth invalidation is therefore inappropriate. *Virginia* v. *Hicks*, 539 U.S. 113, 119-20 (2003).

III. Pandering Of Child Pornography Deserves Reduced First Amendment Protection Because Child Pornography Is Not Properly Categorized Scientifically As A Form Of Speech And Because Pandering Of Child Pornography Is A Form Of Immediate Incitement To Unlawful Activity.

Whether or not a panderer actually has child pornography, the material he claims to have, even if it existed, would not be processed by its recipient as speech. This too confirms that the panderer's "speech" is entitled to reduced constitutional protection, and further undermines the Eleventh Circuit's conclusion that the PROTECT Act violates the First Amendment.

Scholarly research shows that emotionally charged material—such as pornography, and especially child pornography—is evaluated and stored in a separate portion of the brain from material triggering rational thought. The thinking and comprehending portion of the brain is the neocortex; the emotional center of the brain is the limbic system.

According to Dr. Daniel Goleman, emotional visual signals bypass the neocortex and go directly to the limbic system. Relying on the work of Joseph LeDoux, a neuroscientist at the Center for Neural Science in New York, Goleman notes that the brain has a "back alley" that allows its emotional centers to receive "direct inputs from the senses before they are fully registered by the neocortex." Daniel Goleman and Richard Davidson, eds., *Consciousness, Brain, States of Awareness, and Mysticism* 18 (1979) (cited in Judith A. Reisman, *The Psychopharmacology of Pictorial Pornography: Restructuring Brain, Mind & Memory & Subverting Freedom of Speech* 14 (July 2003)). When this happens, "[t]he limbic system can become so highly activated that it overwhelms rational thought, making a person speechless with fury or joy." *Ibid.* Pictorial sex stimuli are so strong that they take advantage of this process and "dominate the limbic system." *Id.* at 17.

In other words, "the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process." Frederick Schauer, *Speech and 'Speech'—Obscenity and 'Obscenity': An Exercise in the Interpretation of Constitutional Language*, 67 Geo. L. J. 899, 922-923 (1979). Pornography is thus not a form of speech, but "a sexual surrogate. It takes pictorial or linguistic form only because some individuals achieve sexual gratification by those means." *Ibid.* As Professor Sunstein argues, because "[t]he effect and intent of pornography . . . are to produce sexual arousal, and not in any sense to affect the courts of self-government . . . pornography does not have the special properties that single out speech for special protection; it is more akin to a sexual aid than a communicative expression." Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589, 602-608.

This conclusion accords with common experience. "When information is passed using words, the listener typically weighs and assesses the believability of the mes-

sage. Often the listener is counter-arguing inside [her] head against a verbally presented message." Mary Anne Layden, Dir. Ctr. for Cognitive Therapy, Dep't of Psychiatry, Univ. of Pennsylvania, Testimony before the Senate Committee on Commerce, Science, and Transportation (Mar. 4, 1999) (available at http://commerce.senate.gov/hearings/0304lay.pdf).

By contrast, images, especially graphic images, "are mentally processed as events, as facts and are stored unbuffered and unchallenged." *Id.* Indeed, "of all our senses, sight is the most likely to involve recall. And the more bizarre the visual image the more likely we are to see and remember it. . . . To Aristotle, this formation of mental images was like tracing a signet ring on wax." Reisman, at 8 (citing Richard Restak, *The Brain*, New York's Bantam (1984)). Relying on this same principle, Adolph Hitler held that "propaganda must be addressed to the emotions and not to the intelligence . . . vicious and gruesome, with lurid photographs . . . sexual and physical. . . [T]he masses need a thrill of horror." Anthony Rhodes, *Propaganda: The Art of Persuasion: World War II*, 12-15 The Wellfleet Press (1987) (cited in Reisman, *supra* at 14).

In short, scientific literature and common sense confirm that pornographic pictures literally short-circuit the brain, circumventing the speech and logic regions and lodging deeply in the brain's emotional centers. This is *a fortiori* true of pornographic images of children, which are emotionally supercharged. It follows that pornographic images of children are not properly categorized scientifically as speech.

Because pornographic images of children are not speech, neither the pandering nor receipt of such images is entitled to First Amendment protection. As the Court has recognized, "[t]he fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 67-68

(1973). The pandering of child pornography, which is not speech but a sexual surrogate, is much more closely related to the pandering of a prostitute or sale of drugs than it is to the promotion and distribution of political pamphlets, or even to the advertising of a typical commercial product. And there is, of course, "no doubt that a newspaper constitutionally [can] be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973).

In this sense, the pandering of child pornography is simply a form of "incit[ement] [to] imminent lawless action" entitled to no First Amendment protection under *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). As the Court explained in *Brandenburg*, the government may suppress speech advocating a violation of law if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Ibid*; see also *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 579 (2001) ("A direct solicitation of unlawful activity may of course be proscribed.").

The pandering of child prostitution incites precisely such action, for the panderer advertises, promotes, presents, distributes, or solicits material the mere possession of which constitutes a crime. See 18 U.S.C. § 2252A(a)(5). And, of course, the same immediate incitement is present whether the panderer actually possesses illegal materials or not—just as the solicitation of prostitution may be criminalized even if the person solicited turns out to be not a prostitute but an undercover agent.

Thus, not only is child pornography "more akin to a sexual aid than a communicative expression" and therefore not speech, Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L. J. 589, 602-608, but it is also a sexual aid the mere possession of which constitutes criminal conduct. The pandering of such material, therefore—whether or not the panderer possesses it—is an im-

mediate incitement to unlawful activity not entitled to First Amendment protection.

For that reason as well, the Act's pandering provisions cannot be said to reach a substantial amount of protected speech, and the Eleventh Circuit was therefore wrong to invoke the overbreadth doctrine.

CONCLUSION

The decision below should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

MICHAEL WILLIAMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37.

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

MIM has an interest in this case because it is frequently asked by federal and state law enforcement agencies, legislators, and private citizens for advice and guidance on methods to enforce and improve existing laws concerning the regulation and distribution of obscenity, child

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead and Co-Counsel Robert W. Peters of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

pornography and exploitation, and child sexual abuse. MIM recognizes this case to be a major precedent in regulating the pandering, production, distribution and possession of actual or virtual child pornography.

MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002); *City of Los Angeles v. Alameda Books, Inc. and Highland Books, Inc.*, 535 U.S. 425 (2002); *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) and 542 U.S. 656 (2004).

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

CONSENT TO FILE BRIEF

The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

SUMMARY OF ARGUMENT

The pandering doctrine speaks to the merchandising of sexually explicit material in such a way as to purposely emphasize its prurient appeal. This doctrine emerged in Judge Learned Hand's opinion in *United States v. Rebhuhn* in 1940 and was later upheld in 1966 in *United States v. Ginzburg*. Despite language by the Eleventh Circuit in the instant case that *Ginzburg's* "precedential value is questionable" due to the Court's affordance of more protection to commercial speech, *amicus* argues that the pandering doctrine is still good law and can properly be used to determine whether the underlying material at issue in a particular case has violated either obscenity or child pornography laws.

ARGUMENT

I. *UNITED STATES V. GINZBURG* IS STILL GOOD LAW

In *United States v. Williams*, 444 F.3d 1286 (11th Cir. 2006), the Court of Appeals opined that notwithstanding the "brief mention" of *United States v. Ginzburg*, 383 U.S. 463 (1966) by this Court in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002),[2] "there is some question as to the continued vitality of the *Ginzburg* pandering rationale."[3] The 11th Circuit went on to say:

> Shortly after *Ginzburg* was decided, the Supreme Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*...that truthful, non-misleading commercial speech is protected by the First Amendment...The sort of pandering that caused the publications in *Ginzburg* to be found obscene, in other words, has since gained some First Amendment protection. In one of two post-*Ginzburg* cases in the 1970s, a dissent joined by four justices states that '*Ginzburg* cannot survive *Virginia Pharmacy*'...While the Supreme Court has not substantially addressed the *Ginzburg* pandering rationale since the 1970s, Justice Stevens more recently reiterated that, since *Ginzburg* was decided before the Court extended First Amendment protection to commercial speech, a proposal that otherwise legal material be deemed obscene on the basis of its titillating marketing, is 'anachronistic'...

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[2] 535 U.S. at 258 ("in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test").

[3] 444 F.3d at 1301.

> Consequently, although *Ginzburg* has not been overturned, its precedential value is questionable.[4]

Justice Stevens "reiterated" his disapproval of *Ginzburg* in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, at 828-829 (2000).

In *United States v. Ginzburg*, 383 U.S. 463 (1966), this Court upheld convictions for mailing matter that was obscene and for using the mails to advertise matter that was obscene, in violation of 18 U.S.C. 1461. Since the Government stipulated at trial that the circulars advertising the publications were not themselves obscene, the convictions on the counts for using the mails to advertise obscenity stood only because the mailing of the publications offended the statute.[5]

In *Ginzburg*, therefore, the counts for mailing the advertising were not grounded on the now discarded principle that commercial speech does not enjoy constitutional protection but on the principle that government can prohibit the advertisement of an illegal product.

In broad terms, the *Ginzburg* Court described the case as follows:

> In the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. In the present case, however, the prosecution charged the offense in the context of the circumstances of production, sale, and publicity and assumed

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[4] *Id.*

[5] 383 U.S. at 465.

that, standing alone, the publications themselves might not be obscene. We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise. As in *Mishkin v. New York*, 383 U.S. 502, and as did the courts below...view the publications against a background of commercial exploitation of erotica solely for the sake of their prurient appeal.[6]

The *Ginzburg* Court went on to say:

The decision in *United States v. Rebhuhn*, 109 F.2d 512 is persuasive authority for our conclusion...That was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and 'could lawfully have passed through the mails, if directed to those who would be likely to use them for the purposes for which they were written . . .' 109 F.2d. at 514 But the evidence, as here, was that the defendants had not disseminated them for their 'proper use, but . . . woefully misused

[6] 383 U.S. at 465-466.

> them, and it was that misuse which constituted the gravamen of the crime.'[7]
>
> We perceive no threat to First Amendment guarantees in thus holding that in close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the *Roth* test.[8]

Read narrowly, *Ginzburg* stands for the principle that "in close cases evidence of pandering may be probative with respect to the nature of the material in question."[9] *Amicus* would contend that *Ginzburg* also stands for the common sense principle that explicit material that might otherwise enjoy First Amendment protection loses that protection if it is marketed for its obscene pornographic qualities. Or, as former Chief Justice Warren put it in *Jacobellis v. Ohio*:

> The use to which various materials are put – not just the words and pictures themselves – must be considered in determining whether or not the materials are obscene.[10]

As this Court also observed in *Miller v. California*, 413 U.S. 15, at 36 (1973), "civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine." *Amicus* would add that in the United

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[7] 383 U.S. at 472-473.

[8] 383 U.S. at 474. (It is noteworthy that neither the U.S. District Court, in determining that each publication was obscene, nor the U.S. Court of Appeals, in affirming the District Court judgments, appears to have based its decision in significant measure on evidence of pandering.)

[9] *Id.*

[10] 378 U.S. 184, 201 (1964) (Warren, E., dissenting).

States we do not allow unregulated access to morphine, period.

It doesn't take much imagination to think of situations where otherwise protected material would properly be prosecuted, depending on the "circumstances of presentation and dissemination."[11]

For example, exhibited in an art museum for their artistic value, some depictions of hardcore sexual conduct might be protected by the Constitution;[12] but marketed to the public for their prurient appeal, the same materials would properly be prosecuted. .

For example, distributed for their purported "sex-education" purpose, some self-described "highly explicit" and "highly arousing" videos might be protected by the Constitution, but marketed to the public for their prurient appeal, the same materials would properly be prosecuted.

Amicus notes that the reverse is also true, as illustrated by Section 235.15 of the New York Penal Law. Section 235.15 provides an "affirmative defense that the persons to whom allegedly obscene...material was disseminated... consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing, distributing or viewing the same."

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[11] *Ginzburg*, 383 U.S. at 470.

[12] In one highly publicized criminal case in which the director of a Cincinnati art museum was acquitted, the material at issue included two photographs of the artist Robert Mapplethorpe that were alleged to be obscene. One photograph depicted a male urinating into the mouth of another. Another photograph depicted a male inserting a bullwhip into his own anus.

It doesn't take much imagination to think of situations where otherwise obscene material would presumably be protected, depending on the "circumstances of presentation and dissemination."[13]

For example, hardcore pornography that would properly be prosecuted if distributed in the marketplace might enjoy Constitutional protection if exhibited for its educational value in a college course on the subject of pornography's impact on women or if disseminated by a mental health professional to treat a sexual dysfunction.

Amicus further contends that in *Ginzburg* and its progeny, "pandering" is not being prohibited or regulated as "commercial speech." Rather, it is being considered as evidence of an underlying crime.

In *Splawn v. California*, 431 U.S. 595 (1977), the defendant was convicted of selling obscene material pursuant to jury instructions that incorporated California Penal Code Section 311(a), which now reads:

> In prosecutions under this chapter, if circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, this evidence is probative with respect to the nature of the matter and may justify the conclusion that the matter lacks serious literary, artistic, political, or scientific value.

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[13] *Ginzburg*, 383 U.S. at 470. *See also, Stanley v. Georgia*, 394 U.S. 557 (1969) (mere possession of obscenity in the privacy of the home is protected by the Constitution).

Defendant argued, among other things, that his conviction violated the prohibition against *ex post facto* laws. In rejecting that argument, the *Splawn* Court said:

> California Penal Code, Section 311(a)...was enacted after part of the conduct for which he was convicted but prior to trial. That section, however, does not create any new substantive offense, but merely declares what type of evidence may be received and considered in deciding whether the matter in question was 'utterly without redeeming social importance.'[14]
>
> (Emphasis added)

Furthermore, the fact that pandering in the obscenity context typically involves matter that is commercially exploited[15] by the defendant – because that is the way most obscenity is distributed – does not mean pandering is or should always be limited to commercial exploitation.

The *Ginzburg* Court said this about the "commercial activity" in that case:

> No weight is ascribed to the fact that petitioners have profited from the sale of publications which we have assumed but do not hold cannot themselves be adjudged obscene in the abstract; to sanction consideration of this fact might indeed induce self-censorship, and offend the

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[14] 431 U.S. at 600. (Under the current test, to be obscene the "work," when taken as a whole, must lack serious artistic, literary, political or scientific value.)

[15] *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 57 (1973) ("we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity").

> frequently stated principle that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment.[16]

Subsequent to *Ginzburg*, this Court also held that the federal obscenity laws apply to the importation of obscenity for non-commercial use[17] and to interstate transportation of obscenity for non-commercial use.[18]

In particular, with respect to the Internet, sexual predators may pander sexually explicit "adult" material to entice, arouse, instruct and desensitize their child victims.

Further, *amicus* contends there are no constitutional concerns that would limit the pandering doctrine to obscenity cases. In "close cases" where there is a question as to whether a depiction of the child's genitals or pubic area is "lascivious"[19] or as to the age of the child, the defendant's own characterization of the material should be admissible in child pornography cases.

Amicus would add that while commercial traffic in child pornography is reportedly growing in leaps and bounds, it is still the case that many adults who are sexually interested in children trade child porn with other adults who are

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[16] 383 U.S. at 474.

[17] *United States v. 12 200-Ft. Reels of Super 8mm Film*, 413 U.S. 123 (1973).

[18] *United States v. Orito*, 413 U.S. 139 (1973).

[19] In the criminal cases involving the director of a Cincinnati art museum mentioned above in footnote 12, a third Robert Mapplethorpe photograph, alleged to be child porn, depicted a female child positioned in such a way that her pubic area was exposed, without underpants.

sexually interested in children, just as children once traded baseball cards

In closing, *Amicus* would point out that *Splawn* was decided in 1977, more than a decade after *Ginzburg* and one year after this Court determined in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), that commercial speech was entitled to First Amendment protection.

In *Splawn*, the Court stated:

> There is no doubt that as a matter of First Amendment obscenity law, evidence of pandering to prurient interests in the creation, promotion, or dissemination of material is relevant in determining whether the material is obscene. *Hamling v. United States*, 418 U.S. 87, 130 (1974), *Ginzburg v. United States*, 383 U.S. 463, 470 (1966). This is so partly because, as the Court has pointed out before, the fact that the accused made such an appeal has a bearing on the ultimate constitutional tests for obscenity:
>
> 'The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness of the publications to those who are offended by such material. And the circumstances of presentation and dissemination of material are equally relevant to determining whether social importance claimed for material

> in the courtroom was, in the circumstances, pretense or reality - whether it was the basis upon which it was traded in the marketplace or a spurious claim for litigation purposes.'[20]

The Court also approved a jury instruction as to pandering in *Pinkus v. United States*.[21] And two years after Justice Stevens referred to *Ginzburg* as "anachronistic,"[22] the Court cited *Ginszburg* with approval in *Ashcroft v. Free Speech Coalition*:

> The Court has recognized that pandering may be relevant, as an evidentiary matter, to the question whether particular materials are obscene. *See Ginzburg v. United States*, 383 U.S. 463... ('In close cases evidence of pandering may be probative with respect to the nature of the material in question and thus satisfy the [obscenity] test'). Where a defendant engages in the 'commercial exploitation of erotica solely for the sake of their prurient appeal,' *Id.* at 466 the context he or she creates may itself be relevant to the evaluation of the materials.[23]

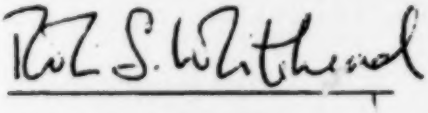
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[20] 431 U.S. at 598-599.
[21] 463 U.S. 293, 303-304 (1978).
[22] 529 U.S. 803, 829.
[23] 535 U.S. 234, 258-259 (2002).

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare the pandering provisions of The PROTECT Act constitutional.

Respectfully submitted,



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No. 06-694

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AND THE FIRST AMENDMENT PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit organizations including literary, artistic, religious, educational, professional, labor, and civil liberties groups[2] that are united in their commitment to freedom of expression. Founded in 1974, the NCAC has educated thousands of artists, authors, teachers, students, librarians, readers, museum-goers, and others around the country about the dangers of censorship and how to oppose it. The NCAC produces legal and scholarly analyses of important free speech cases and controversies; it maintains a clearinghouse of information on a wide range of free expression issues; it assists individuals and community organizations dealing with censorship; and it promotes debate, discussion, and dialogue among diverse stakeholders in the free speech community.

The First Amendment Project ("FAP") is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. FAP provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

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[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Among NCAC's 52 members are the American Association of University Professors, American Civil Liberties Union, American Federation of Television & Radio Artists, American Society of Journalists & Authors, Association of American Publishers, The Dramatists Guild, Children's Literature Association, and the Screen Actors Guild. The views presented in this brief, however, are those of the NCAC and do not necessarily represent the views of any of its members.

Amici have a strong interest in any case in which speech alone is criminalized. As President Harry S. Truman said in vetoing the Internal Security Act of 1950, "'[t]here is no more fundamental axiom of American freedom than the familiar statement: [i]n a free country we punish men for crimes they commit but never for the opinions they have.'" Judge Leonard B. Sokolove, *The Price of Tighter Security is Lost Liberty*, INTELLIGENCER, Oct. 30, 2005, at 8D. Thus, as Justice Brandeis declared 70 years ago, the appropriate response to inflammatory, controversial, or offensive speech "is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

These principles have particular application in a case such as the present one, which involves the highly inflammatory issue of child pornography. In these circumstances, it is imperative that society's compelling interest in preventing the exploitation of children does not become an unwitting vehicle for creating a new class of thought crimes, targeting those whose sole "crime" is to engage in speech that is, or appears to be, about child pornography, but who neither commit crimes against children nor promote them.

Amici do not question the Government's authority to prosecute those who traffic in illegal child pornography. However, *amici* submit this brief to express our concern that Section 2252A(a)(3)(B) of the PROTECT Act goes too far in pursuing that laudable goal. The provision, if upheld, would constitute a dangerous expansion of the Government's ability to penalize and chill speech based on its content, and it would present widespread opportunity for abuse by local law enforcement officials. The risk, demonstrated time and again, is that police officers and prosecutors, in their zeal to combat real child abuse, will charge innocent people with child pornography, solely on the basis of their ideas,

fantasies, speech or expression. Because of the highly inflammatory nature of wrongful charges of child pornography, even the innocent will suffer severe repercussions regardless of whether they are ultimately exonerated.

The threat that child pornography laws could be misapplied to innocent victims is real. *Amici curiae* have tracked countless incidents in which innocent, harmless, or silly behavior has been targeted for criminal prosecution, including numerous cases in which parents, grandparents, and other family members have been investigated, prosecuted, and deprived of custody of their children for taking non-sexual pictures of their children partially or completely nude. *See* Marian Rubin, *et al.*, *Not A Pretty Picture: Four Photographers Tell Their Personal Stories About Child 'Pornography' and Censorship*, in *Censoring Culture: Contemporary Threats to Free Expression*, Robert Atkins & Svetlana Mintcheva, eds., 2006; and Jeffrey Abt, *Forbidden Subjects: How Artists Innocently Run Afoul of the Law*, *Chronicle of Higher Education* (Mar. 21, 1997) http://chronicle.com/che-data/articles.dir/art-43.dir/issue-28.dir/28b00401.htm. That these actions may be attributed to overzealous prosecutors and often dismissed or reversed on appeal provides small comfort to those caught in the process. It is precisely the overzealous prosecutors of the world who most need clear and definitive instructions from this Court.

SUMMARY OF ARGUMENT

The Constitution presents no obstacle to the criminalization of both obscene material, *see Miller v. California*, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment."), and images of actual minors engaging in sexually explicit conduct regardless of whether the images are obscene. *See New York v. Ferber*, 458 U.S. 747 (1982). This case does not involve the legitimate exercise of government authority in such cases.

Indeed, there is no suggestion that existing federal criminal laws, *see* 18 U.S.C. § 1466A (prohibiting obscene visual images of the sexual abuse of children); 18 U.S.C. § 2252A(a)(5)(B) (prohibiting the possession of an image of child pornography), were in any way insufficient in the case against Respondent, who was convicted under 18 U.S.C. § 2252A(a)(5)(B), is presently incarcerated, and will remain so regardless of the outcome of this appeal. Indeed, Respondent's sentence would not have been enhanced by his conviction under Section 2252A(a)(3)(B).

Rather, this case involves the facial unconstitutionality of Section 2252A(a)(3)(B),[3] which is designed to criminalize speech about materials involving virtual and simulated images of minors in sexual situations, and to circumvent this Court's decision in *Free Speech Coalition*, 535 U.S. 234 (2002). In *Free Speech Coalition*, the Court rejected the Government's argument that it could ban non-obscene but sexually explicit materials involving virtual and simulated minors in order to affect the distribution of actual child pornography. The Court should now reject the Government's contention that it may ban speech *about* sexually explicit materials involving virtual and simulated minors in order to reach actual child pornographers.

Further, Section 2252A(a)(3)(B) threatens to criminalize a substantial range of speech that is neither commercial nor false – including sexually explicit materials involving simulations or virtual images of minors, sarcasm, hyperbole, jokes told in poor taste, mistaken beliefs, and advocacy

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[3] Section 2252A(a)(3)(B) of the PROTECT Act criminalizes knowingly "advertis[ing], promot[ing], present[ing], distribut[ing], or solicit[ing]" any "material or purported material in a manner that *reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material is, or contains" either an "obscene visual depiction of a minor engaging in sexually explicit conduct" or a "visual depiction of an actual minor engaging in sexually explicit conduct." 18 U.S.C. § 2252A(a)(3)(B) (emphasis added).

speech – and is thus both substantially overbroad and void for vagueness. Because Section 2252A(a)(3)(B) reaches a substantial and impermissible array of constitutionally protected speech, and lacks necessary contextual and textual limitations on its application, it will permit arbitrary and ad hoc enforcement of severe criminal penalties against individuals engaging in fully protected speech.

Section 2252A(a)(3)(B) is not reasonably susceptible to the Government's proposed limiting constructions, and would be both unconstitutionally overbroad and vague even with the proposed limitations. The statute, on its face, and as properly construed, is a content-based restriction on speech that is unconstitutionally overbroad and vague, and violates strict scrutiny. This Court should thus affirm the decision below.

ARGUMENT

I. SECTION 2252A(a)(3)(B) WOULD CRIMINALIZE AND CHILL CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THIS COURT'S BINDING PRECEDENT.

A. The Statute Criminalizes Speech About Fully Protected "Virtual" Sexually Explicit Materials.

The evident purpose of Section 2252A(a)(3)(B) is to prevent the distribution of sexual content containing virtual and simulated images of minors, even though the Court has held that such material, when not obscene, is protected speech. The statute does this by criminalizing statements urging people to access virtual materials if those statements might be understood to imply that real children are involved. These provisions apply not only to virtual child pornography, but also to film versions of "Lolita" and other fictional and simulated depictions of sexual activity by minors. In effect, the law requires a distributor of legal materials to state expressly that the material is "fake" in order to avoid the risk

of criminal liability, and it imposes strict penalties on speech that is the product of mistake, confusion, or ambiguity. By subjecting a broad range of protected speech to severe criminal penalties, Section 2252A(a)(3)(B) runs directly afoul of the Court's decision in *Free Speech Coalition*.

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Court confirmed that, under the Court's prior decisions in *New York v. Ferber*, 458 U.S. 747 (1982), and *Osborne v. Ohio*, 495 U.S. 103 (1990), only sexually explicit images created through the sexual exploitation of real children are wholly exempt from First Amendment protection. *See Free Speech Coalition*, 535 U.S. at 251-56. The Court thus struck down Sections 2256(8)(B) and 2256(8)(D) of the Child Pornography Prevention Act of 1996 ("CPPA") as facially overbroad and therefore unconstitutional under the First Amendment. *See Free Speech Coalition*, 535 U.S. 234.[4]

In striking down these sections of the CPPA, the Court refused to hold that all depictions of minors engaged in sexual activity are "by definition without value." *Id.* at 251. Rather, this Court found that the exception for child pornography was "based upon how it was made, not on what it communicated." *Id.* at 251. In other words, although the Court recognized in *Ferber* that laws "directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy," *Ferber*, 458 U.S. at 756, it

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[4] Section 2256(8)(B) of CPPA prohibited "any visual depiction, including any photography, film, video, picture, or computer or computer-generated image or picture that is, [or appears to be], of a minor engaging in sexually explicit conduct," while Section 2256(8)(D) defined child pornography "to include any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241-432 (internal quotation marks omitted).

found that the state's interest in preventing the sexual exploitation of children is paramount when actual children are involved in the production of pornography. *See Free Speech Coalition*, 535 U.S. at 249.

This calculus changes, however, in the case of sexually explicit materials involving simulations and virtual images of minors because no actual children are involved in the production of the material. As this Court found in *Free Speech Coalition*, "where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment." *Id.* at 251; *see also id.* at 250 (stating that virtual child pornography "records no crime and creates no victims by its production"). Indeed, in *Ferber*, this Court suggested that sexual content using simulations to create the *illusion* of minors engaged in sexual activity was a viable constitutional alternative to the use of actual minors. *See Ferber*, 458 U.S. at 763. Although it is true that many would find sexually explicit material utilizing virtual and/or simulated images of minors to be offensive, First Amendment law is clear that "speech may not be prohibited because it concerns subjects offending our sensibilities." *Free Speech Coalition*, 535 U.S. at 245; *see Virginia v. Black*, 538 U.S. 343, 358 (2003)("The hallmark of the protection of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomforting.")(citation omitted); *Lee v. Weisman*, 505 U.S. 577, 590 (1992) ("To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.") Further, as the Court has emphasized in the parallel context of obscenity, "statutes designed to regulate obscene materials must be carefully limited" because there are "inherent dangers of undertaking to regulate any form of expression." *Miller*, 413 U.S. at 23-24.

Where, as here, a law punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," the law will be invalidated on overbreadth grounds. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Section 2252A(a)(3)(B) subjects to prosecution anyone who "advertises, promotes, presents, distributes, or solicits . . . any *material or purported material* in a manner that *reflects the belief*, or that is *intended to cause another to believe*, that the material or purported material *is, or contains* – (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct." (emphasis added). The Government concedes that simulations and virtual images of minors are covered under the terms of Section 2252A(a)(3)(B). Petr's Br. at 48 ("The statute properly reaches concerted efforts to promote materials as real child pornography even if the image or video actually delivered is innocuous[.]").[5] The statute thus suppresses speech that the Court held is protected under the First Amendment in *Free Speech Coalition*. *See* 535 U.S. at 250-51.

By their nature, materials that use adult actors or computer-generated images to portray minors engaged in sexually explicit conduct are intended to simulate actual minors engaging in such conduct. In such a case, the statement describing simulated or virtual materials would not be "false," as the Government suggests – rather, such statements could not strictly be described as "true" or "false,"

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[5] Indeed, the language of Section 2252A(a)(3)(B) mirrors CPPA's constitutionally infirm Section 2256(8)(D), which defined child pornography "to include any sexually explicit image that was advertised, promoted, presented, described, or distributed in such a manner that conveys the impression it depicts a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 242 (internal quotes omitted).

yet they would be subject to severe criminal penalties under Section 2252A(a)(3)(B). Thus, a wide range of statements describing simulated and virtual materials – such as urging another to view "hot pictures of kids having sex" or to "watch these steamy scenes of an old man having sex with a 12-year-old Lolita" – would appear to fall squarely within the terms of the statute.

The Government therefore is wrong when it argues that the statute prosecutes only truthful "pandering" of actual child pornography and false speech that is devoid of constitutional protection.[6] Rather, in its failure to require that the defendant know or intend the underlying material to be actual child pornography, Section 2252A(a)(3)(B) punishes speech without context. The government, however, "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Free Speech Coalition*, 535 U.S. at 253 (quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969)). As the Court of Appeals properly found, "[h]owever repugnant we may find them, we may not constitutionally suppress a defendant's beliefs that simulated

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[6] The Government's sweeping statement that all non-commercial "false" speech is devoid of First Amendment protection is also incorrect. To the contrary, the Court has emphasized that the First Amendment "requires that [the Court] protect some falsehood in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). Indeed, the Court has repeatedly found it preferable to encourage the robust and open exchange of ideas at the expense of allowing some false speech to be disseminated, rather than prohibit all false speech at the expense of chilling protected speech. *See, e.g.*, *Gertz*, 418 U.S. at 340-41; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). Likewise, the Government's suggestion that criminalizing false or misleading commercial speech gives rise to *no* First Amendment protections ignores the Court's decisions affording protection to commercial speech, even in the context of claims that the speech is false or misleading. *E.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002); *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 146 (1994).

depictions of children are real or that innocent depictions of children are salacious." Pet. App. 26a-27a. Section 2252A(a)(3)(B) therefore "goes well beyond [prohibiting illegal conduct] by restricting the speech available to law-abiding adults." *Free Speech Coalition*, 535 U.S. at 252-53. The Government may regulate and punish trafficking in actual child pornography, but it may not restrict otherwise fully protected speech simply because it bears a resemblance to unprotected speech. That is precisely what the Court held only a few years ago in *Free Speech Coalition*.

The Government nonetheless asks this Court to ignore its holding in *Free Speech Coalition* and uphold a criminal law that would ban speech promoting virtual or simulated depictions of minors engaged in sexual activity, but offers no new rationales or arguments to justify disturbing the precedent. Instead, the Government presses the same arguments already raised and rejected in *Free Speech Coalition*. Thus, while conceding that the statute could be used to prosecute an individual whose statements – and the material underlying the statements – are otherwise entirely protected, *see* Pet'r Br. at 35, the Government repeats the claim that criminalization of such speech is constitutionally permissible because "[m]istaken speech of this character. . . . creates the impression that a supply of or demand for real child pornography exists, and thus leads to the abuse of children." Pet'r Br. at 36. Similarly, according to the Government, "Congress may regulate the demand side of this illegal market by prohibiting child-pornography solicitations, even if the material ultimately supplied is not actual child pornography, in an effort to 'stamp out this vice at all levels in the distribution chain.'" Pet'r Br. at 30-31 (quoting *Osborne*, 495 U.S. at 110). But as the Court of Appeals noted, that argument was squarely rejected by this Court in *Free Speech Coalition*. Pet. App. 13a.

In *Free Speech Coalition*, as here, the Government argued that banning virtual images of children engaged in sexually explicit conduct was necessary in order to "eliminat[e] the market for pornography produced using real children." 535 U.S. at 254. The Court rejected that proposition, holding that the Government's "market deterrence" theory did not justify a complete suppression on speech where "there is no underlying crime at all," because "virtual" images depicting minors engaged in sexual activity do not involve the sexual exploitation of children. *See id.* The Government must show "more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse." *Id.* at 253. Here, Section 2252A(a)(3)(B) contains no requirement that the underlying material is actual child pornography, that the defendant intends the underlying material to be actual child pornography, or that there is *any* underlying material at all. Where there is no underlying crime, the Government's market deterrence theory is insupportable. *See id.* at 254.

The Government also argues, as it did in *Free Speech Coalition*, that Section 2252A(a)(3)(B) is justified as a means to aid law enforcement, because of the difficulties of discerning which images involve real minors and which are simulated or virtual. Pet'r Br. at 48-49. But in striking down an almost identical provision in the CPPA, the Court rejected precisely the same argument, holding that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Free Speech Coalition*, 535 U.S. at 255. The constitutional boundary drawn by the Court in *Free Speech Coalition* is clear: virtual and simulated depictions of sexually explicit activity involving minors are constitutionally protected, while child pornography produced through the exploitation of actual children is not. Congress "may pass valid laws to protect children from abuse, and it

has; [t]he prospect of crime, however, by itself does not justify laws suppressing protected speech." *Id.* at 245.

Boiled down to its essence, it is clear that the Government's position, rejected in *Free Speech Coalition*, has not changed. The Government seeks to cast a wide net over protected speech in order to minimize the burdens on prosecutors because such protected speech resembles unprotected speech.[7] The fact that actual child pornography is illegal does not relieve the government of its duty to establish required elements for the substantive offenses of distribution and possession of real child pornography; and it certainly cannot be used to impose severe criminal penalties on those who are engaging in entirely protected speech. *See id.* at 255 (noting that the government raises "serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful").[8] The Government offers no new logic to support

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[7] Indeed, the Government's real goal appears to be avoiding the need to prove the existence of *any* underlying materials altogether. *See* Pet'r Br. at 49. The history of the provision – and the Government's defense of it – makes clear that the purpose of Section 2252A(a)(3)(B)'s broad language is to sweep in protected simulated and virtual sexually explicit depictions of minors to relieve prosecutors of their constitutional burden of proving that defendants accused of possessing, distributing, and/or soliciting child pornography have trafficked in child pornography that was produced through the sexual exploitation of actual children. *See* S. Rep. No. 108-2, at 6 (2003) (stating that the PROTECT Act seeks to allow prosecutors to "establish [their] case-in-chief when the children portrayed in sexually explicit depictions appear virtually indistinguishable from actual minors").

[8] Indeed, Section 2252A(a)(3)(B) potentially punishes protected speech more severely than actual possession of real child pornography. Section 2252A(a)(3)(B) punishes those convicted with a mandatory jail sentence of between five and ten years for a first conviction, *see* 18 U.S.C. § 2252A (b)(1), while those convicted of possessing child pornography under Section 2252A(a)(5) of the PROTECT Act may only receive a fine. *See* 18 U.S.C. § 2252A(b)(2).

its argument that the Court should abandon the holdings of *Ferber* and *Free Speech Coalition*.

B. The Statute Threatens To Suppress A Wide Range Of Constitutionally Protected Speech.

Because Section 2252A(a)(3)(B) threatens to criminalize a substantial amount of speech that is neither commercial nor false, it is unconstitutionally overbroad. The breadth – that is, overbreadth – of its sweep is substantial. For example, a person could be prosecuted under the terms of Section 2252A(a)(3)(B) if he or she sent an e-mail with an attached video containing a preview of the 1992 movie "The Lover," with text that read, "A 15-year-old French girl is sent to a Saigon boarding school, where she meets a 32-year-old Chinese aristocrat. Love at first sight leads to a liaison where the lovers revel in a variety of sexual encounters," regardless of the fact that the attached material is artistic expression that is wholly protected under the First Amendment and the text presented in the e-mail is an almost verbatim transcription of the movie's description on Netflix.com.[9]

Section 2252A(a)(3)(B)'s overbreadth is exacerbated by its extremely vague terms. The statute's critical phrase – "in a manner that reflects the belief or that is intended to cause another to believe" – is completely unclear, especially in contexts where speech prohibited under this section may be similar, or even identical, to speech that the Court has declared is protected. A reasonable person could be wary

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[9] The full Netflix synopsis of "The Lover" is "Set in French Colonial Vietnam in 1929, this Oscar-nominated film explores the erotic charge of forbidden love. A 15-year-old French girl is sent to a Saigon boarding school, where she meets a 32-year-old Chinese aristocrat. Love at first sight leads to a liaison where the lovers revel in a variety of sexual encounters. They both realize that their love is doomed, however, as neither of their families will approve of the interracial coupling." *See* http://www.netflix.com/Movie/The_Lover/60011230?trkid=189530&strkid=742730821_0_0 (last visited Aug. 14, 2007).

that an e-mail containing attachments concerning a film graphically depicting childhood sexual abuse – including mainstream films such as "Bastard Out of Carolina"[10] or "Hounddog"[11] – could subject him to criminal penalties if the e-mail were accompanied by text stating, "This material is absolutely repugnant. Why would anyone want to watch a graphic scene of a man raping a child?" Such an e-mail is susceptible to being interpreted as "presenting" material that the distributing person "intend[s] to cause another to believe" is "a visual depiction of an actual minor engaging in sexually explicit conduct." The lack of clarity in the terms used by Section 2252A(a)(3)(B) "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images," *Reno v. ACLU*, 521 U.S. 844, 872 (1997), thus impermissibly chilling a substantial amount of speech.[12]

Section 2252A(a)(3)(B)'s broad and vague terms also sweep in non-commercial, truthful speech such as sarcasm, hyperbole, jokes told in poor taste, mistaken beliefs, and

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[10] "Bastard Out of Carolina," a 1996 movie directed by Anjelica Huston, is based on Dorothy Allison's 1992 novel about childhood physical and sexual abuse. *See* http://www.netflix.com/Movie/Bastard_out_of_Carolina/287069?trkid=189530&strkid=663234440_0_0 (last visited Aug. 14, 2007); http://www.imdb.com/title/tt0115633/ (last visited Aug. 14, 2007). The movie was initially banned by Canada's Maritime Film Classification Board, though that ban was reversed on appeal. *See* Parker Barss Donham, *Let's Get Over Our Nervousness*, Halifax Daily News, March 2, 1997, available at http://www.cfc.ca/pages/media/halifax-daily-news.02mar97.html.

[11] "Hounddog" is a 2007 movie about a "precocious but abused 12-year-old who finds comfort in Elvis Presley's music." *See* http://www.netflix.com/Movie/Hounddog/70061472?trkid=189530&strkid=482614468_0_0 (last visited Aug. 14, 2007). The movie's depiction of the rape of the lead character, played by 12-year old Dakota Fanning, was marked by controvery. *See, e.g.*, http://www.foxnews.com/story/0,2933,246698, 00.html (last visited Aug. 14, 2007).

[12] For these same reasons, Section 2252A(a)(3)(B) is also unconstitutionally vague. *See infra* Section II.

advocacy speech. For example, the plain language of Section 2252A(a)(3)(B) would appear to permit the prosecution of an individual who e-mailed a video clip of a simulated sex scene from a film version of "Lolita" with text that was sarcastic ("Wow. This scene with the old man having sex with the 12-year-old was hot. Yeah, not really. Ew. Can you believe this?"); text that revealed a mistaken belief ("I just found this video file on this library computer and I believe it's kiddie porn. Can we see about blocking people from viewing this kind of material on the library's computers?"); as well as text advocating stricter laws against child pornography ("You see, this kind of obscene material involving children having sex is abhorrent. We need stricter laws."). It does not take much imagination to think of a panoply of other examples involving lewd jokes, overstatements, and honestly mistaken beliefs that could also trigger prosecution under Section 2252A(a)(3)(B).

The statute's constitutional infirmities are exacerbated by its failure to tie the speech communicated to proof, knowledge, or intent that the underlying materials contain images of actual child pornography. Because the operation of Section 2252A(a)(3)(B) is wholly divorced from the underlying material presented, or even from the requirement that there *be* underlying material, the determination of illegality "turns on how the speech is presented, not on what is depicted." *Free Speech Coalition*, 535 U.S. at 257.[13]

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[13] Indeed, an individual charged with violating 2252A(a)(3)(B) may not even defend himself on the ground that the material does not involve actual minors. Although federal law provides an affirmative defense to someone charged with transporting, receiving, distributing, reproducing, selling, or possessing child pornography under 18 U.S.C. §§ 2252A(a)(1), (a)(2), (a)(3)(A), (a)(4), or (a)(5), it does not provide such a defense for a person's description of materials depicting minors engaged in sexually explicit activity – even if the materials are fully protected. *See* 18 U.S.C. § 2252A(c).

Even if the material advertised, promoted, presented, distributed or solicited contains no sexually explicit scenes involving minors, the sender could be treated as a "panderer" of child pornography merely if his or her statements about the material "convey[ed] the impression that [such] scenes would be found in the [material]." *Free Speech Coalition*, 535 U.S. at 257. The law, as written, lacks sufficient textual limits, and thus criminalizes a broad range of speech that would otherwise be protected.

C. The Government's Untenable Statutory Interpretations Do Not Save The Statute From Unconstitutionality.

The Government argues repeatedly that the statute, "properly understood," or "properly construed," could not conceivably be applied to suppress protected speech. *See* Pet'r Br. at 14, 17, 32, 44. Implicit in the Government's contorted attempts to read limitations into the statutory text is an acknowledgment that under its plain language, Section 2252A(a)(3)(B) *would* chill and penalize a significant amount of constitutionally protected speech.

The Government thus asserts that the phrase "in a manner that reflects the belief, or that is intended to cause another to believe," implies objective and subjective elements that are not specified in the statute. Under the Government's interpretation, a person may be held liable for violating Section 2252A(a)(3)(B) only where the Government can prove that the speaker believed, or intended to cause another to believe, that the materials depicted child pornography involving actual children, and that the individual knew "that a reasonable person would interpret his words, in context, as referring to real child pornography." Pet'r Br. at 34. Further, the Government claims that 2252A(a)(3)(B) "encompass[es] only direct offers to send, or attempts to obtain, real or purported contraband," Pet'r Br. at 27, and could not reach

general "promotions" of "virtual" or "simulated" sexually explicit materials depicting minors.

The problem with the Government's proposed limiting interpretations – which serve to underscore the serious overbreadth and vagueness problems raised by the statute's plain language – is that they can be achieved only by ignoring the common usage of the plain language of Section 2252A(a)(3)(B). Although this Court may "impose a limiting construction on a statute" in considering a facial challenge, it may only do so if the statute is "'readily susceptible' to such a construction." *ACLU*, 521 U.S. at 884 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)). If the statute is not readily susceptible to such a construction, then the Court will not rewrite the law "to conform it to constitutional requirements." *ACLU*, 521 U.S. at 884-85 (quoting *Am. Booksellers*, 484 U.S. at 397); *see also Osborne*, 495 U.S. at 121 (stating that judicial rewriting of statutes would derogate Congress' "incentive to draft a narrowly tailored law in the first place"). Here, the Government's attempts to limit the broad and vague language of the statute fail as a matter of statutory interpretation and, in any event, do not save the law from unconstitutionality.

The Government's claim that the term "in a manner" creates an "objective benchmark" of a reasonable person standard, Pet'r Br. at 33, is not supported by anything in the statute's text. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed[.]" *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The plain meaning of "manner" is "[a] way of doing something or the way in which a thing is done or happens." *American Heritage Dictionary of the English Language* 1065 (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* 1376 (1993) (defining "manner" as "the mode or method in which something is done or happens[;] a mode of procedure or way of acting"). Section

2252A(a)(3)(B) thus means exactly what it says – that speech is criminalized when it is "advertise[d], promote[d], present[ed], distribute[d], or solicit[ed]" in such a way that the communication "reflects the belief," or "is intended to cause another to believe" that the "material or purported material" is obscene or a "visual depiction of an actual minor engaging in sexually explicit conduct." Had Congress intended to include a "reasonable person" standard in the statute, it easily could have done so.

Nor is there any support in the statute for the knowledge element posited by the Government – *i.e.*, that the statement be made with *knowledge* that a reasonable person would interpret the speaker's words as intending, or causing the recipient to believe, that the material contained images of actual children. Pet'r Br. at 34. As the Government concedes, such an element could be implied only through a tortured grammatical reading of Section 2252A(a)(3)(B). Pet'r Br. at 34.[14] Moreover, the factors that led the Court to read a "knowingly" scienter requirement into a different child pornography statute in *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994), are entirely missing here. In *X-Citement Video*, the Court found that although the "most natural grammatical reading . . . suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces," *id.* at 68, that result would lead to a number of anomalies, *see id.* at 68-69,

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[14] The Government urges the Court to apply the word "knowingly" not only to the surrounding verbs of "advertis[ing], promot[ing], present[ing], disribut[ing], or solicit[ing]," but also to the requirement that the communication be made "in a manner that reflects the belief, or that is intended to cause another to believe." The awkwardness of this construction is evident when one inserts the word "knowingly" where the Government suggests it should be – "knowingly . . . advertises, promotes, presents, distributes, or solicits . . . material or purported material [knowingly] in a manner that reflects the belief, or that is [knowingly] intended to cause another to believe."

including absurd construction of the statute, *see id.* at 69, inconsistency with the legislative history, *see id.* at 73-78, and a lack of scienter requirement in the statute, *see id.* at 78. Here, by contrast, the purpose of the term "knowingly" in the statute is clear: to respond to the Court's concern in *Free Speech Coalition* that the CPPA criminalized "possession of material described, or pandered, as child pornography by someone earlier in the distribution chain." 535 U.S. at 258. By requiring that defendants "knowingly" advertise, promote, present, distribute, or solicit material, Congress addressed the Court's concern that "the taint remains on the speech in the hands of subsequent possessors." *Id.* at 243. Reading "knowingly" to apply only to the surrounding verbs thus does not lead to absurd statutory results in this case; rather, it is fully consistent with the statute's legislative purpose.

Likewise, the Government cannot successfully limit the broad reach of Section 2252A(a)(3)(B) by limiting the words "advertises," "promotes," "presents," "distributes," or "solicits" solely to "direct offers to send, or attempts to obtain, real or purported contraband." Pet'r Br. at 27. That is plainly not the language used by the statute, nor is the statute readily susceptible to such a construction. Contrary to the Government's claims, the statute is not limited to commercial exchanges, and the Government's invocation of the interpretive canon of *noscitur a sociis* to limit Section 2252A(a)(3)(B) is not persuasive.

The doctrine of *noscitur a sociis* states that "words grouped in a list should be given related meaning." *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989). In Section 2252A(a)(3)(B), the words "advertises," promotes," "presents," "distributes," and "solicits" are grouped together. All of these words have non-commercial definitions: advertise can mean "[t]o make known;" promote can mean "[t]o urge the adoption of; advocate;" distribute can mean

"[t]o deliver or pass out:" and solicit can mean "[t]o seek to obtain by persuasion, entreaty, or formal application." *American Heritage Dictionary of the English Language* 25, 525, 1403, 1654 (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* 31, 660, 1815, 2169 (1993) (defining "advertise" as "to make known to (someone) : give notice to : inform : notify;" "promote" as "to contribute to the growth, enlargement, or prosperity of : further, encourage;" "distribute" as "to divide among several or many: deal out: apportion esp. to members of a group;" and "solicit" as "to make petition to : entreat, importune" "or to strongly urge (as one's cause or point) : insist upon" or "to endeavor to obtain by asking or pleading : plead for."). In contrast, only four of these words have comparable commercial definitions – "presents" lacks a commercially relevant definition. *See The American Heritage Dictionary of the English Language* (4th ed. 2000); *see also Webster's Third New Int'l Dictionary* (1993). Section 2252A(a)(3)(B) is thus not "readily susceptible" to the construction that only speech regarding commercial exchanges is regulated. Indeed, in considering almost identical language in Section 2256(8)(D) of the CPPA, the Court found that language banning depictions of sexually explicit conduct that were "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct," did not "require that the context be part of an effort at 'commercial exploitation.'" *Free Speech Coalition*, 535 U.S. at 258.

In sum, under the statute's plain text, it impermissibly prohibits speech based "on how the speech is presented, not on what is depicted." *Free Speech Coalition*, 535 U.S. at 257. Even if the Government's narrowing interpretations were accepted by the Court, it still would not cure Section 2252A(a)(B)(3)'s constitutional infirmities because, as the Government acknowledges, speech promoting non-obscene

sexually explicit materials involving simulated or virtual images of minors would still be proscribed. Petr's Br. at 35-36. The Government's proposed narrowed interpretation – that the statement be made with knowledge that a reasonable person would interpret the speaker's words as intending, or causing the recipient to believe, that the material was obscene or contained a visual depiction of an actual minor engaged in sexually explicit activity – would still capture speech that is "true" and fully protected. *See supra* pp. 5-12. The Court held in *Free Speech Coalition* that the Government cannot ban sexual content involving virtual images of minors in the effort to penalize actual child pornography, and it should now reject the Government's argument that it may ban speech *about* sexually explicit materials involving virtual minors in order to penalize actual child pornographers.

D. The Statute Cannot Be Justified Under *Ginzburg*.

The Court should reject the suggestion, implicit in the Government's brief, and made explicitly by *amicus curiae* Morality in Media, that Section 2252A(a)(3)(B) may be sustained as a form of proscribable pandering *per se*, that is, pandering without any evidence as to the underlying material presented. *See* Petr's Br. at 37-38, 41 n.15 (stating that a person should be prosecuted under Section 2252A(a)(3)(B) for suggesting that Disney's "Snow White" contains a visual depiction of actual child pornography even if the underlying videotape is blank); Morality in Media, Brief Amicus Curiae of Morality in Media, Inc. at 7 (Jun. 11, 2007) (No. 06-694). The Court has never held that the Government may criminalize pandering *per se*. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 238 n.1 (1990) (Brennan, J. concurring) ("What *Ginzburg* did not do, and what this Court has never done, . . . is to abrogate First Amendment protection for an entire category of speech-related businesses."). Rather, the Court has held only that "in close cases evidence of pandering may be probative with respect to

the nature of the material in question," and thus help provide context for application of the obscenity test. *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *see also Free Speech Coalition*, 535 U.S. at 237-38; *Splawn v. California*, 431 U.S. 595, 598 (1977). *Ginzburg* does not support the argument that pandering is a crime independent of the materials being pandered, nor that material protected under the First Amendment loses its constitutional protection because of the way it is described or advertised.[15]

II. SECTION 2252A(a)(3)(B) FAILS STRICT SCRUTINY.

Because Section 2252A(a)(3)(B) is a content-based regulation, it is "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and must satisfy strict scrutiny, which requires the statute "be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000). "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Id.* It is "rare that a regulation restricting speech because of its content will ever be permissible." *Id.* at 818.

Although the Government has a compelling interest in combating actual child pornography, it does not have a compelling, or even legitimate, interest, in "suppress[ing] lawful speech as the means to suppress unlawful speech."

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[15] Indeed, as the Court of Appeals noted, it is unclear that the pandering rationale used in *Ginzburg* survived this Court's subsequent decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), in which this Court held that commercial speech was entitled to First Amendment protection. As Justice Stevens observed in *Playboy Entm't Group, Inc.*, 529 U.S. at 829 (Stevens, J. concurring), it is "anachronistic" after *Virginia State Board* to contend that otherwise legal material should be deemed obscene merely because of its titillating marketing. *See also Splawn v. California*, 431 U.S. 595, 603 n.2 (1977) (Stevens, J. dissenting).

Free Speech Coalition, 535 U.S. at 255; *see also* Br. of Media Coalition at 12-13. Section 2252A(a)(3)(B) also fails strict scrutiny because it is not narrowly tailored to promote the Government's interest in combating actual child pornography. As explained above, the breadth of the statute's vague terms, along with its failure to correlate the speech with underlying criminal material, impermissibly sweeps in a wide range of protected, non-commercial, and "true" speech within its ambit. *See supra*, Parts I.A and I.B. As a result, Section 2252A(a)(3)(B) is far from narrowly tailored.

If, as the Government argues, Section 2252A(a)(3)(B) were intended to proscribe only "offers and solicitations of illegal products" and "misleading offers of material purported to be contraband," then Congress could reach such conduct with a far less restrictive statute – one that married the prohibited speech with the underlying materials. For example, if Section 2252A(a)(3)(B) were narrowed to prohibit "knowingly . . . advertis[ing], promot[ing], distribut[ing], or solicit[ing] . . . any material . . . [that the person knows to be or to contain] . . . an obscene visual depiction of a minor engaging in sexually explicit conduct; or . . . a visual depiction of an actual minor engaging in sexually explicit conduct," then the statute would still reach "offers and solicitations of illegal products" – actual child pornography – without impermissibly criminalizing a broad swath of protected speech. Given the existence of plausible, less restrictive alternatives, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy Entm't*, 529 U.S. at 816.

III. SECTION 2252A(a)(3)(B) IS VOID FOR VAGUENESS.

Section 2252A(a)(3)(B) is not only unconstitutionally overbroad, it is also unquestionably void for vagueness.[16] A penal statute is void for vagueness where it does not define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Vague laws "offend several important values." *Grayned*, 408 U.S. at 108. First, they "may trap the innocent by not providing fair warning." *Id.* Second, vague laws "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis[.]" *Id.* at 108-09; *see also Kolender*, 461 U.S. at 358 n.7 (stating that it would be "dangerous if the legislature could set a net large enough to catch all possible offenders" and then leave it to the courts "to step inside and say who could be rightfully detained, and who should be set

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[16] Overbreadth and vagueness are "logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n.8 (1983). In the First Amendment context, both doctrines guard against laws that impermissibly chill a substantial amount of protected speech. *See ACLU*, 521 U.S. at 871-72; *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.6 (1982). Despite the Government's contention that this Court should not consider Williams' vagueness challenge because his conduct under Section 2252A(a)(3)(B) involved child pornography involving actual minors, facial vagueness challenges are permitted if the law in question reaches "a substantial amount of constitutionally protected speech." *Kolender*, 461 U.S. at 358 n. 8 (quotation marks omitted); *see also Hoffman Estates*, 455 U.S. at 494. This is especially true in cases involving criminal sanctions, which "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU*, 521 U.S. at 872; *see also Winters v. New York*, 333 U.S. 507, 515 (1948); *Kolender*, 461 U.S. at 358 n.8.

at large"). Precision in drafting is particularly important under the First Amendment because "[u]ncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned*, 408 U.S. at 109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

The language used in Section 2252A(a)(3)(B) fails both to define the crime of "pandering" child pornography with sufficient definiteness to give an ordinary person notice of what conduct is proscribed and to give law enforcement sufficient standards to prevent arbitrary and ad hoc enforcement. As discussed in Part I.B., *supra*, it is far from clear that the terms "advertises, promotes, presents, distributes," and "solicits" are limited solely to commercial exchanges, or whether they also encompass non-commercial speech such as advocacy, sarcasm, and lewd jokes. Additionally, as the Court of Appeals found, the phrase "in a manner that reflects the belief, or that is intended to cause another to believe" is "so vague and standardless as to what may not be said that the public is left with no objective measure to which behavior can be conformed." Pet. App. 39a. The lack of clarity in the terms used by Section 2252A(a)(3)(B) "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." *ACLU*, 521 U.S. at 872.

Moreover, the statute lacks sufficient textual and contextual limits to prevent arbitrary or ad hoc law enforcement actions. As a result, "[i]ndividual officers are thus endowed with incredibly broad discretion to define whether a given utterance or writing contravenes the law's mandates." Pet. App. 39a. As currently written, a person who uploads a video to the Internet with the description, "Hot, Heavy, and Graphic Teen Sex" could be prosecuted under Section 2252A(a)(3)(B) regardless of whether (a) the video is a visual depiction of actual 14-year olds engaged in

sexually explicit conduct, (b) the video is a visual depiction of youthful-looking 21-year-olds engaged in sexually explicit conduct, (c) the video is a scene from the movie "Lolita," (d) the video is a homemade video castigating those interested in looking at child pornography, or (e) the video link even functions. Because the statute, as written, criminalizes the statement "Hot, Heavy, and Graphic Teen Sex" without regard to the underlying material, police could interpret any of the examples as criminal behavior, even if they involve wholly protected First Amendment speech. As a result, Section 2252A(a)(3)(B) should be invalidated as impermissibly vague.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

UNITED STATES,
Petitioner,

v.

MICHAEL WILLIAMS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioner*

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Legal Foundation (NLF) is 501c(3) is a non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the issue of child pornography.

SUMMARY OF THE ARGUMENT

Michael Williams posted announcements on public and private Internet chat rooms regarding the bartering of photographs of child pornography falls under the commercial speech doctrine. Relying upon the characteristics of commercial speech found in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), Williams's postings are economically motivated, are an advertisement, and reference a specific product. First, Williams's postings have an economic motivation because he anticipates obtaining pornographic pictures in exchange for his pornographic pictures, and bartering of goods, like pictures, plays an important role in commerce. Second, Williams's postings are commercial advertisements because they are not speech that is solely informative or editorial in nature. Third, Williams's postings refer specifically to his daughter, including approximate age and scenario, as well as indicating the pornographic nature of the pictures; thus indicating a specific product for barter. Ultimately, because Williams's

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *amicus curiae*, its members, and its counsel.

chat room postings about child pornography for barter fit the characteristics of commercial speech, they should be held to such standards.

ARGUMENT

I. THE ACT OF BARTERING PORNOGRAPHIC PICTURES ON THE INTERNET IS A COMMERCIAL ACTION AND SHOULD BE REGULATED AS COMMERCIAL SPEECH.

Commercial speech is usually not afforded the same protection under the First Amendment as non-commercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985). Williams bartered pornographic pictures, which is a commercial act which should be regulated as commercial speech under the First Amendment. To determine whether speech is commercial, this Court relies on a common sense understanding and history of commercial speech as speech regarding a commercial transaction and the three characteristics described in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983).

A. Williams's Speech is Commercial Speech Because it Relates to a Commercial Transaction.

The understanding of what commercial speech entails has changed over time. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (citation omitted), this Court stated that commercial speech is that speech "which does 'no more than propose a commercial transaction.'" The United States District Court for the Third Circuit clarified this definition in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 933 (3d Cir. 1990) (citing *Bolger*, 463 U.S. at 66-67; *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980)), defining commercial

speech as "expression related to the economic interests of the speaker and its audience." This Court in *Zauderer v. Office of Disciplinary Counsel* made the point that "our commercial speech doctrine rests heavily on 'the 'common-sense' distinction between speech proposing a commercial transaction . . . and other varieties of speech.'" 471 U.S. at 637 (quoting *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 455-56 (1978)).

A proper understanding of commerce is a prerequisite to properly defining commercial speech. In *Kidd v. Pearson*, 128 U.S. 1, 20-21 (1888), this Court, in differentiating manufacture from commerce, quoted the definition of commerce found in *County of Mobile v. Kimball*, 102 U.S. 691, 702 (1881) (emphasis added), which states "'[c]ommerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and *exchange of commodities*.'" Ten years later in *Adair v. United States*, 208 U.S. 161, 177 (1908), this Court included "traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages . . . indeed, every species of commercial intercourse among the several States" in its understanding of commerce. The inclusion of communication and the transmission of messages is relevant because it broadens commerce from the mere trading or selling and purchasing of goods. The Internet, as a borderless creation, connects people of the several states which affects national commerce. *See, Am. Library Ass'n v. Pataki*, 969 F. Supp. 160, 168-69 (S.D.N.Y. 1997).

In 1983, this Court, in order to clearly determine what speech qualifies as commercial speech, set out three characteristics of commercial speech in *Bolger*, 463 U.S. at 66-67. There, this Court, recognized three characteristics of commercial speech: advertisements, references to specific products, and an economic motivation behind the speech. *Id.*

This Court relies on an aggregate of the characteristics. None of these characteristics by itself is enough to classify the speech as commercial speech, but any combination of the characteristics is indicative of commercial speech. *Id. at* 67. When all three of the characteristics are met, such as in this case, there is an overwhelming indication of commercial speech. *Id.*

B. Williams's Act of Bartering Pornographic Pictures on the Internet Meets the Three *Bolger* Characteristics Because it is Economically Motivated, is an Advertisement, and Refers to a Specific Product.

As stated above, *Bolger v. Youngs Drug Products Corp.* sets out three characteristics of commercial speech. 463 U.S. at 66-67. If the speech is an advertisement, refers to specific products and has an economic motivation it is commercial speech. *Id.* Williams's online conversations regarding, leading to, and including the bartering of pornographic pictures on the Internet has an economic motivation of receiving more pornographic pictures through a barter transaction, is an advertisement of pornographic pictures, and refers to specific pornographic pictures of his daughter for trade.

1. *Williams's Bartering of Pornographic Pictures is Economically Motivated Because He Anticipates Receiving Something of Value in Return.*

Williams had an economic motivation behind bartering pornographic pictures of children on the Internet because he receives something of value in return. In *Bolger v. Youngs Drug Products Corp.* this Court included the characteristic of an economic motivation in determining commercial speech. 463 U.S. at 67.

Bartering is a form of commerce because commerce is generally a trade between two parties. *Commerce, Black's Law Dictionary* 269 (6th ed. 1990). Bartering, simply defined, is one good or service traded for another good or service. *See,* Nigel M. Healey, *Why is Corporate Barter?*, 31(2) Business Economics 36, 36 (1996); Don Mardak, *The World of Barter*, 84(1) Strategic Finance 44, 46 (2002); Richard E. Plank *et al.*, *Barter: An Alternative to Traditional Methods of Purchasing*, 30(2) International Journal of Purchasing and Materials Management 52 (1994). Further, bartering is a system of bargaining between two parties to reach an exchange where each can benefit from the value of the traded goods. Caroline Humphrey, *Barter and Economic Disintegration*, 20 (New Series) MAN (now, The Journal of the Royal Anthropological Institute) 48, 49 (1985). Bartering removes the necessity of money in commerce. *Id.* at 51. Money is merely one of the goods being traded.

Adam Smith, the founder of economics, in *An Inquiry into the Nature and Causes of the Wealth of Nations*, Book I, ch.2 (5th ed. 1904), discusses bartering and its influence on the economy. Bartering is used to get those goods and services that an individual needs. Smith also indicated that individuals started specializing in tasks in order to trade any surplus for other necessary goods that another individual specializes in creating. *Id.* Smith said "[i]t is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest," which explains how there is an inherent value in the goods the individuals trade instead of giving up something for free. *Id.* Because the goods have a value when trade occurs both parties are getting something of value in return, which is commerce.

Bartering plays a strong role in modern commerce, though the practice is quite old. Major corporations have bartered for decades. In 1935, Monsanto allowed a Chinese company to barter mackerel for saccharin. Tim Phillips, *The New Global Currency*, Guardian Unlimited (Feb. 27, 2003),

http://technology.guardian.co.uk/online/businesssolutions/story/0,12581,903514,00.html. PepsiCo exchanged their products for distribution rights to sell Russian vodka in the 1970s. *Id.* Corporations such as Tesco, BMI, and Coombe International (manufacturer of Odor-Eaters and Just for Men) participate in international bartering. *Id.* In 2004, in North America and Latin America, 2.3 billion dollars were bartered in commercial trades. *2004 Global Reciprocal Trade Statistics*, International Reciprocal Trade Association (2005), http://www.irta.com/Page.asp? Script=56. There are now two national trade associations that assist bartering between corporations: The International Reciprocal Trade Association (IRTA) and National Association of Trade Exchanges (NATE). Bob Meyer, *The Original Meaning of Trade Meets the Future in Barter*, 13(1) World Trade Magazine 46, 48 (2000). Bartering has become global with the help of the Internet, which facilitates bartering between parties of different nations and states, allowing a broader variety of goods and services to be bartered. *Id.* at 48-49.

The reason corporations barter and exchange goods is because of the benefits for the business. It allows the corporation to better shift their inventory during shifts in the supply and demand market. Mardak, 84(1) Strategic Finance at 46-47. Bartering can also create a way for the business to get products or services it could not purchase with cash. Angela Briggins, *When Barter is Better*, 85(2) Management Review 58, 59 (1996). Bartering also allows corporations to reserve cash. Tim Phillips, *The New Global Currency*, Guardian Unlimited (Feb. 27, 2003), http://technology.guardian.co.uk/online/businesssolutions/story/0,12581,903514,00.html. A value is also created through bartering by either bartering products for a higher value than it cost or by fulfilling exchanges for less than in a purchasing situation. Healey, 31(2) Business Economics at 40. The benefits of bartering encourage corporations to participate in the barter system of commerce.

Speech which reflects an economic motivation,

typically in advertisements, is found throughout case law. In *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975), this Court found that an advertisement for abortions in a newspaper was a reflection of "the advertiser's commercial interests." In *Zauderer*, an attorney placed an advertisement in a newspaper to promote his practice and gain new clients. 471 U.S. at 629. In *U.S. Healthcare, Inc.*, Blue Cross/Blue Shield's advertisement for the Personal Choice healthcare plan was motivated by a desire to gain revenue and regain status in "the health insurance market." 898 F.2d at 934.

By advertising that he had good pictures of his daughter Williams was looking for pornographic pictures in return. Like the advertisers in *Bigelow*, *Zauderer*, and *U.S. Healthcare, Inc.*, and like the bartering corporations of PepsiCo, Monsanto, and others, wanting to benefit their businesses, Williams was looking to benefit by accessing more child pornography. His post to the chat room, "Dad of toddler has 'good' pics of her an [sic] me *for swap* of your toddler pics, or live cam," was to initiate a bargain where each party would receive pornographic images of children. *United States v. Williams*, 444 F.3d 1286, 1288 (2006) (emphasis added). Williams was not freely giving his pictures away, but was anticipating a valuable good in return. While it was not an exchange for money, Williams sought to benefit by receiving goods equivalent to or greater than his goods by receiving images of child pornography, which is an economic gain. Williams's anticipation of receiving pornographic images in return for his images is evidence of an economic motivation behind his speech because he is will receive something of value in return for his good.

2. *Williams's Chatroom Postings Indicating Pornographic Pictures for Barter is a Commercial Advertisement Because it is Not a Conveyance of Information or Opinion.*

Williams's online conversations leading to bartering

are commercial advertisements of his products for barter because he is not making a merely an editorial or informative statement about child pornography. In *Bolger v. Youngs Drug Products Corp.*, this Court indicated that advertisements are included in commercial speech characteristics. 463 U.S. at 66-67. In *Valentine v. Chrestensen*, 316 U.S. 52, 53 (1942), this Court supported the idea that a commercial advertisement is one in which relates to anything except speech "solely devoted to 'information or a public protest.'" Then in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964), this Court found that speech that does not display *only* information, opinions, or grievances of a matter of public interest is a commercial advertisement.

In *Valentine v. Chrestensen* an advertisement for a United States Navy submarine exhibit was held to be a commercial advertisement. 316 U.S. at 52-53. The advertisement displayed the submarine and indicated an admission fee for the exhibit. *Id.* at 53. This advertisement was a commercial advertisement because the advertisement displayed the price of admission and was not merely information about the submarine nor regarded a matter of public interest. *Id.*

In *New York Times Co. v. Sullivan* the newspaper ran a full page newspaper advertisement discussing non-violent demonstrations by African American students and asked for funds to "support the student movement, 'the struggle for the right-to-vote,' and the legal defense of Dr. Martin Luther King, Jr." 376 U.S. at 256-57. The Court found that this was not commercial speech because it was an expression of an opinion and the plea for money was to support "matters of the highest public interest and concern." *Id.* at 266.

Williams posted a public message in the Internet chat room which stated "Dad of toddler has 'good' pics of her an [sic] me for swap of your toddler pics, or live cam." *Williams*, 444 F.3d at 1288. In a private chat with "Lisa_n_Miami" Williams stated "I've got hc [hard core]

pictures of me and dau, and other guys eating her out – do you??" *Id.* He later posted a message on the public chat room stating "HERE ROOM; I CAN PUT UPLINK CUZ IM FOR REAL – SHE CANT." *Id. at* 1288-89.

Williams's first public posting is an advertisement of the goods he is willing to trade with others in the Internet chat room. Like the advertisement in *Valentine*, Williams is advertising a good that he will relinquish for a return exchange of pictures or videos instead of money. Williams is not requesting other pictures or videos in return as a way of supporting a matter of high public interest like that found in the advertisement in *New York Times Co.* Williams's second public chat posting that he had the ability to put up a link to pornographic pictures is an advertisement for the pornographic photographs he claimed to have. This posting was not merely informative or editorial like the advertisement in *New York Times Co.*, but is an advertisement indicating the goods he is willing to commercially barter, or exhibit, like the submarine in *Valentine*, with the others in the chat room. Williams is not merely displaying his opinion or information about the pictures or the link to "hard core" pictures but is advertising a commercial exchange of goods and therefore his advertisements about pictures of his daughter posted for the chat room is a commercial advertisement.

3. *Williams's Chatroom Postings Refer to the Specific Product of Child Pornography Because He Makes Specific Indications That the Images Are Pornographic Images of His Daughter.*

Williams's postings in the public chat room and in the private chat with "Lisa_n_Miami" reference the specific product of pornographic images of a young girl, Williams's daughter, for trade. The characteristics of commercial speech found in *Bolger v. Youngs Drug Products Corp.* state

that the speech should indicate a specific product. 463 U.S. at 66. It can be understood that this indication of a specific product stems from the desire to "disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24.

One instance of a specific reference to a product indicating commercial speech is found in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, where advertisements written by pharmacists for prescription drugs were deemed commercial speech. The advertisements specifically referenced particular prescription drugs and price information, thus referencing a specific product. 425 U.S. at 756-57. The advertisements indicated a sale of a prescription drug at a specific price instead of general information. *Id.* at 760-61.

Another example of the reference to a specific product as an indication of commercial speech is found in the advertisements for a healthcare plan produced by Blue Cross/Blue Shield in *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 934 (3d Cir. 1990). The advertisements specifically promoted the Personal Choice plan over other competitors' healthcare plans. *Id.*

Williams posted on the public chat room that he had "'good pics' of her an [sic] me for swap" referring to pictures of him and his toddler-aged daughter. *Williams*, 444 F.3d at 1288. Later, in his private chat with "Lisa_n_Miami" he stated that he had "hc [hard core] pictures of me and dau, and other guys eating her out." *Id.*

Both of Williams's postings are about pictures of his daughter; specifically, pornographic pictures of his daughter. These were not general advertisements about the pictures he had but referenced a specific person indicating her age, gender, and the type of photograph (hard core, young girl, and includes other men). Much like the advertisements in *Virginia State Board of Pharmacy*, which referenced specific prescription drugs instead of general information, these

statements advertise the specific product of pornographic pictures of a young girl instead of general child pornography. Like the advertisements in *U.S. Healthcare, Inc.* which were used to promote customers to prefer one particular kind of healthcare, Williams is also promoting his product of pornographic pictures by clearly indicating that they are specifically of his daughter. By indicating that the pictures he had available to barter with other individuals in the chat room and with "Lisa_n_Miami" were of his own daughter and specifically indicated some of the specifics of the images, Williams was making a reference to a specific, not general, product.

CONCLUSION

For the foregoing reasons, as well as other reasons stated in the Petitioner's brief, this Court should reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

This 11th day of June, 2007

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